No. 25

IN THE

Supreme Court of the United States

October Term, 1941

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY

On Writ of Certiorari to
The United States Circuit Court of Appeals
For the Fourth Circuit

BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

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BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

Opinions Below

The opinion of the Circuit Court of Appeals (R. 1005-19) is reported in 115 F. (2d) 414. The decision of the Board (R. 952-80) is reported in 20 N. L. R. B. 911.

Jurisdiction

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the act of February 13, 1925 (28 U. S. C. A., 347 (a)) and upon Section 10 (e) and (f) of the National Labor Relations Act (hereinafter called the Act).

The decree under review of the Circuit Court of Appeals, entered on November 12, 1940 (R. 1019-20), set aside an order of the National Labor Relations Board (hereinafter called the Board) against Virginia Electric and Power Company (hereinafter called the company), such proceeding having been instituted by a petition of the company to set aside and an answer of the Board asking enforcement. Certiorari was granted on March 31, 1941 (R. 1022-3).

Statute Involved

Pertinent provisions of the Act are set out in the Appendix to the Board's brief, pp. 60-62.

Questions Presented

The basic questions presented are:

1. Whether there is adequate evidence and basis in law to support the Board's finding of domination, etc. in violation of Section 8(2) of the Act.

2. Whether there is adequate evidence and basis in law to support the Board's finding of intimidation in violation of Section 8(1).

3. Whether there is adequate evidence to support a finding of discriminatory discharge of four employees in violation of Section 8(3).

4. Whether two of such former employees are disentitled to reinstatement on additional grounds.

5. Whether the Board's order, if resting on adequate evidence and basis in law, is in all its remedial forms within the Board's power or whether modifications must be made, including elimination of the requirement for disestablishment and the requirement to reimburse employees for all union dues deducted from wages pursuant to their individual assignments and the check-off provision of a union agreement.

Statement of the Case

The Board answered questions 1, 2 and 3 above in the affirmative and question 4 in the negative. The court below held that there was no basis for such findings by the Board on questions 1, 2 and 3 and that each of such questions could be answered only in the negative. It therefore set aside the Board's order in its entirety. Accordingly it did not have occasion to consider, and did not consider, questions 4 and 5 above.

The brief for the Board condenses the case into terms of ultimate conclusions and does not present to the Court any living view of the record. This is unfortunate where a basic issue is the sufficiency of the evidence to sustain the Board's conclusions. A mingling of important with unimportant events upon a common basis further adds to the possibilities

of confusion. This is not repaired by frequent repetition of the resulting summary.

So a further summary of the facts will be needed to correct the inaccuracies and omissions in the Board's brief. Since such summary relates to the merits of the case, it will be made under the Argument below.

Summary of Argument

On the issues above noted, the company's position is to the following effect:

1. There is no basis in fact or law for any finding of domination or support of the Independent Organization of Employees (hereinafter referred to as the Independent) by the company; on the contrary, the evidence clearly requires the conclusion that the Independent is a labor organization spontaneously created by the free choice of the employees and is their lawful collective bargaining agency. The Board's order for disestablishment (including the related requirements to cease recognition of the Independent and its contract) was therefore properly set aside by the court below.

(a) The declarations by management on April 26, 1937 and May 24, 1937 were wholly non-partisan and could not restrain organizational choice (A, 3 below).

(b) Even if such declarations had implied a preference by management as between organizational forms, they nevertheless unequivocally declared complete liberty of organizational choice and freedom from any resulting discrimination, so they are insufficient for a violation of the Act, both as a matter of statutory construction (*Texas & New Orleans R. Co.* v. *Railway Clerks*, 1930, 281 U. S. 548) and as a matter of constitutional privilege of free speech (A, 4 below).

(c) The Independent was organized and administered by free choice and strictly independent action of the em-

ployees themselves, without aid or support by the company (A, 5 below).

(d) Uses of company property were unauthorized, incidental and insufficient to imply management support or involve any violation of the Act (A, 6(c) below).

(e) The background and miscellaneous incidents relied on by the Board are unimportant and could not have had any actual influence on the motives of the men, particularly after the management declarations of April 26th, May 24th and June 24th, and in the light of such announcements the employer is not fairly responsible for such incidents (*N. L. R. B.* v. *Link-Belt Co.*, 1941, 311 U. S. 584, 599) (A, 1, 2 and 7 below).

2. There is no basis in fact or law for a finding of interference with free organizational choice under Section 7, and the Board's order in this respect was therefore properly set aside by the court below (A 2, 6 and 7 below).

3. There is no basis for a finding of discriminatory discharge and therefore no basis for any reinstatement order and in any case a reinstatement order is barred as to two of the men by unlawful conduct and voluntary resignation respectively (B, below).

4. Even if the Board's order were competent and enforceable, nevertheless its provisions exceed the Board's power in circumstances like those here and thus should in any event be modified, including elimination of the disestablishment requirement unless a finding of violation of Section 8(2) was permissible and in any event elimination of the requirement for reimbursement of all checked-off dues (*Republic Steel Corp.* v. *N. L. R. B.*, 1941, 311 U. S. 7) (C, below).

Since the claim of intimidation contrary to Section 8(1) and Section 7 is made only as an incident to the major issue

of domination contrary to Section 8(2), those two issues will be considered together. Thus the argument will proceed in three parts: (1) the question of domination (including the claim of intimidation), (2) the question of discriminatory discharge and (3) the question of the form of the order. Should the position of the court below on the first two of such parts be sustained, there will of course be no occasion to consider the third.

ARGUMENT

A.
THE ISSUE OF DOMINATION

1. The Issue Defined

The Board makes no claim that the Independent falls short in any degree of militant representation of its members' interests; that there is anything objectionable in its constitution or by-laws, the contract made between it and the company or the manner in which such contract was negotiated; or that the company contributes any support to the Independent or dominates it in any way or interferes in any way with the control exercised over it by its members (Board's Brief, *passim;* and [illegible] R. 1012). The whole claim of the Board rests on ev[illegible] the formative period of the Independent, during the [illegible] of approximately four months preceding September, 1937. That period accordingly delimits the issue.

Within that period itself the main events are easily identified and it is on that sequence that the merits of the case depend. The Board's brief, however, does not tell that history in any proper perspective. Attention is diverted from the central theme to incidental events that were of no real importance in characterizing the atmosphere or the motives of the time.

A reestablishment of the basic events in their natural

colors and proportions is therefore the first step toward a determination of the case on its merits.

2. So-Called Background

The Board may of course resort to background for perspective, but it may not convict on background alone, nor is it entitled to substitute a formalistic composite of scattered background incidents for the plain and notorious events that determine an episode. The Board's Decision and brief transgress those limits.

Thus the Board mentions (Decision, R. 959, Brief, p. 4) a strike in 1922 because of the company's refusal to renew an agreement. The Board does not mention, however, the reasons for such refusal, or the nature of such refusal or the merits of the issue; indeed those matters are not shown by the record. Nor does the Board mention a sale of virtually all the common stock of the company in 1925 to one new controlling interest and a resulting change of management (R. 315). Whatever may be the unknown merits or demerits of 1922, they can not be relevant now.

The Board repeatedly mentions (Decision, R. 959, Brief, pp. 4, 9, 14, 29) an NRA speech by the company's president. The Board chooses to summarize by the statement that organization "is entirely unnecessary." This was of course said, but the speech also declared that pursuant to law, which the company intended to obey, "employees shall have the right to organize and bargain collectively through representatives of their own choosing," "employees shall be free from interference, restraint or coercion of employers in the exercise of their rights established by the law" and "employees shall have the right to organize in any form of organization which they see fit to join" (R. 885-6). But that side of the speech the Board does not choose to mention. Its summary is not fair and the whole event is irrelevant, being about four years before the events here in issue and not

shown to have any relation thereto or to have left any surviving impression on the mind of any one.

The inaccurate nature of the Board's summary is aggravated by its assertion (Brief p. 14) that "there never was any modification made" in this company policy. The reason for that statement is omitted by the Board although given in the same passage in the record; Mr. Holtzclaw, the company's president, testified that he had recognized ever since the NRA "that the employees were to be free from any interference or coercion or undue influence of any kind on that subject" and had made every effort to make it plain to management and employees that that was the case (R. 430). The impression intended by the Board's fragmentary quotation is, moreover, directly opposed to the unquestioned testimony of Mr. Holtzclaw that

> ". . . the N. R. A. was a very mild thing as compared with the Wagner Labor Relations Act . . .
> "Our policy today is a far more 'hands off' policy as to labor than it was in 1933" (R. 465).

The Board's brief gives much emphasis to "a labor spy" employed by the Company (Brief, pp. 4, 9, 14 and 29). But this specter shrinks with any examination of the record; he was only mentioned in a footnote in the Board's Decision (Note 10, Decision, R. 960). This man (Walters) originally came to the company as a "checker" (one who, as a well recognized and universally used service, travels on trolleys and buses to observe fare accounting by operators) and remained in that capacity. Later his duties were enlarged to include giving the company information on any and all matters that might be of importance to its business; thus notably, information in regard to unlicensed "jitney" operators at a time when the bus transport system in Norfolk was in great disorder. Labor conditions were by no means the primary task of Walters; on the contrary, "He made very few

reports on labor" (R. 399) and in fact only one is referred to in the record (in 1933, R. 399). The evidence does not show that the employment of Walters was known or suspected by any of the employees except one (R. 76), so there is no basis for any inference that such employment had any significant influence on the men. On the other hand, the evidence does show that Walters never made any report to the company on any labor question after the enactment of the Act, became fatally ill before any of the events here in question (i. e., in March, 1937), never got out of bed again, was discharged near the end of May and died soon afterwards*. None of the facts in this paragraph is opposed or questioned by any of the Board's findings.

With the same technique the Board's brief attempts to use one other isolated and obscure event as supplying a general atmosphere throughout the system. In one city out of the many communities served and in one department of the various operations, the Board says that one supervisory employee (Bishop) once questioned several men in 1936 in respect of organizational activities (Decision, R. 960, Board's Brief, pp. 4, 9, 12, 14-15, 29). Even within this compass the Board somewhat exaggerates. Mr. Bishop did not admit, as the Board asserts (Decision, R. 960), that he questioned about fifteen of the respondent's employees but that he "called in several fellows and asked if they knew anything about it and they said they did not" (R. 400). The whole

* R. 56-59, 326-327, 331-334, 371-372, 399-402, 444, 462. A company witness, Mr. Jones, first thought that there had been a report from Walters in March of 1937, relating to the visit of an organizer, Parker, to the Reeves Avenue Station (R. 326-327); but his recollection was quite clear that he had heard of Parker's visit to Reeves Avenue by a report from the powerhouse engineer (R. 333) and Mr. Jones subsequently acknowledged that he was wholly uncertain that Walters ever made any report on the subject (R. 333-334). It is evident that Mr. Jones' first recollection was a mistake. Mr. Bishop testified that no report was made by Walters (R. 402); so did Mr. Throckmorton (R. 371-372).

episode was entangled with prolonged drinking parties by the men at a bootleg store (R. 400-401). There is no claim, either in the Board's Decision or in its brief, of any actual consequences from such questioning, in particular no claim that it deterred any one from free association with any labor group. On the contrary the court below found that "any effect of such questioning had unquestionably been dissipated" by the events hereinafter reviewed (R. 1019).*

The only other claim by the Board with respect to so-called background is the company's response to two organizational suggestions, in 1933 and 1937. Such response is stigmatized in the Board's brief as if a pervasive conviction of anti-union hostility must have emanated from the company's conduct. There is, however, no basis for any such view. The facts are that in each case the organizer was told that he was free to proceed as he desired, but not to solicit on company time and property (R. 350-351, 370-372, 428-429, 448-449, 468). The departure of the organizer in 1933 was distinctly due to the preference of the men not to join his organization (R. 448-9). The 1937 effort was apparently not a serious one, for the organizer never returned (R. 350-351, 370-372, 428-429, 449). There is no indication that either reply was felt by the organizer to be an unreasonable limitation or that either reply ever became known to any of the men; indeed the company's purpose in making such replies was to show that the men were free to do what they wanted (R. 430).

It is not in slender and scattered incidents of this character that there may be reasonably found any manifestation of employer attitude sufficiently distinct to create a general atmosphere of the time or to impair in any way full freedom of choice on the part of the men. On the contrary it would

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* The Board's brief does not assert error on the part of the court below in this respect (Brief, pp. 2-3). The episode is not within the issues of the complaint (Board Ex. 1, R. 9-13), which spoke only of alleged Section 7 violations "at various times since January 1, 1937."

seem that the very paucity of the incidents so industriously exploited by the Board is, for a company employing some 3500 men and operating through a large area in tidewater Virginia and northeastern North Carolina, proof of recognition of the employees' organizational liberty.

In any case these are mere decorations with which the Board seeks to impose a predetermined look on the sequence of events dealt with below, though the latter are by general admission manifestly determinative of the case.

3. Declarations By Management

(a) The Bulletin of April 26, 1937

The early months of 1937 were a time of general preoccupation and concern with questions of labor organization. The subject was confused by the declared opposition of certain industries, the violence in certain areas and the implicit claims of certain labor representatives that enrollment in some union was indispensable.*

This general preoccupation was brought to a focus by two events in April, 1937. The first, of a general nature, was the decision of this Court on April 12 sustaining certain applications of the Act.** The other, particularly affecting the Company, was the statement of an organizer that he proposed to organize the electric department (page 9, above).

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* R. 249, 271-273, 313, 343-344, 449-450 and 549.

** The Board's brief emphasizes the claim that that decision "gave no intimation to [Holtzclaw's] mind of any change in the company's policy towards labor relations whatever" (R. 429-30, Board's Brief, p. 15). The Board's brief, however, does not point out the reason for that result, stated by the same witness at the cited portion of the Record, namely, that he had "recognized ever since the NRA that the employees were to be free from any interference or coercion or undue influence of any kind on that subject" and had "made every effort to make it plain to everybody in the management and to the employees that that was so." See also page 7 above.

While there was no intimation of any dissatisfaction or of any organizational activity among the company's employees, there were numerous indications that the employees would like to know their position and that of the company on organizational matters and it seemed clear that the general preoccupation should be clarified by a distinct statement of company policy.*

Such a declaration of company policy was made by posting throughout the properties the following bulletin (R. 35):

"April 26, 1937.

To Employees of the Company:

As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.

"The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, de-

* R. 55, 249-250, 271-274, 312-313, 315-316, 428-431, 449-450.

spite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

"This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

J. G. Holtzclaw,
President."

The Board has summarily held that the mere act of posting this bulletin interfered with, restrained and coerced the employees in the exercise of the rights created by the Act (R. 962). It reached this result by "interpreting" the bulletin as an appeal to bargain with the company without the intervention of any national union.

There is, however, no basis for any such interpretation. This document, like most others, is indigenous to its time. On April 26, 1937, the two opening sentences of the bulletin could not convey to any reasonable reader any shade of partisanship for or against the cause of national labor organization; they were merely a concise, dispassionate reference to important and obvious current conditions. The incontestible contrast between those conditions and the order and peace theretofore characterizing the company's relationships with its employees referred to in the next sentence was the whole occasion for the announcement, marking, as it did, the historical occasion for interest by the employees in the com-

pany's position. It would not have been possible to indicate this occasion more temperately.

After this introductory reference the bulletin makes three substantive statements:

> (1) "The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company."
>
> (2) ". . . it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary."
>
> (3) "If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully."

The first of these was a distinct and unequivocal declaration of paramount organizational right. The second is an equally true and uncolored statement of immunity from compulsory organization. The third is nothing more than a statement of uniform company policy that if there were any dissatisfaction among the men, the officers would be glad to know about it and see what could be done.*

Evidence was taken at the hearing as to the purposes of the executives in publishing this bulletin. Such evidence was unequivocal and uncontradicted. Mr. Holtzclaw, president of the company, testified on cross-examination by counsel for the Board that the purpose of the bulletin was

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*This remains lawful under the Act: ". . . any individual employee or a group of employees shall have the right at any time to present grievances to their employer" (Sec. 9a) and an "employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay" (Sec. 8 (2)).

> "to inform our employees that they could join any union that they saw fit to join, free from influence or domination by the Company; that they did not have to join any union, if they did not want to join any union, and if they wanted to talk over any matter with the Company, to come in and talk it over" (R. 450).

T. Norman Jones, vice president of the company, testified on examination by the Trial Examiner that the purpose of the bulletin and the message intended by it was to make clear to the employees that, as far as the company was concerned, they could become members of a union, or not, "as they saw fit" (R. 348).

This testimony is stated in fragmentary and misleading form in the Board's brief. After presenting only one side of the 1933 NRA speech (namely, the negative right not to join a union, although the affirmative right to join a union was also declared in the speech, see p. 6 above), it is misleading for the Board to quote Mr. Holtzclaw as saying that by the May 24th address "we simply wanted to tell our employees again just what we told them in 1933 . . ." (Board's Brief p. 18), especially when the full sentence testified by the witness was as follows (R. 430):

> "We simply wanted to tell our employees again just what we told them in 1933, that under the new law the Wagner Act, which had been declared valid by the Supreme Court, they had a right to form, join or assist in organizing any labor organization—the right to self-organization; we wanted to tell them that it was not necessary that they join any organization; third, we wanted to tell them that if they wanted to talk to us on any subject that was in their mind, they could do so."

The Board is not entitled to disregard all the qualifying circumstances that constitute the historical occasion for any utterance. Nor is it entitled to parse each phrase with

fastidious concern to see whether it would have stated the matter in precisely those terms. The Board is authorized only to determine whether as a practical matter in the light of existing circumstances the bulletin prevented full liberty of choice on the part of the men, for it is only where employers "interfere with, restrain or coerce employees in the exercise of the rights . . . to self-organization, to form, join or assist labor organizations . . ." that the Board may find an unfair labor practice (Sections 7 and 8), which alone it may prevent (Section 10a). It can not be said that the publication of this bulletin interfered with any such freedom on the part of the employees; on the contrary it specifically proclaimed such freedom. There is, therefore, no reasonable basis for the Board's adverse conclusion in this regard and the order below is in this respect clearly right.

(b) THE MEETINGS OF MAY 24, 1937

In making the statement in the bulletin that if there were any dissatisfaction among the men, the officers would be glad to know about it and see what could be done, the officers did not suppose that there was any substantial dissatisfaction existing among the men at that time. No indications of any such condition had been received. They were very much surprised, therefore, to receive during the next few weeks petitions from substantial numbers of men in various points throughout the system indicating dissatisfaction with their wages and working conditions.* These included a request from many of the Norfolk car and bus operators for an increase in wages of nearly 50% and certain changes in hours of work and meals and three oral petitions or requests from the electric and transportation departments in Richmond

* R. 37-38, 40-41, 51-52, 115-118, 249-251, 316-317, 334-336, 372-373, 388, 431, 432-433 and 450-452.

for an increase in wages and certain changes in working conditions.

Some of these requests in regard to working conditions were not hard to satisfy. The wage requests, however, were a different thing. The transportation operators had just been given a blanket raise in February and a further raise of nearly 50% would be wholly impossible (R. 266-267, 431-433). On the other hand, it was recognized that satisfaction on the part of the men is one of the most important assets in any company of this kind, not only for their own contentment but also for the spirit of the organization and for the quality of the service it can give the public. It was essential, therefore, that a state of satisfaction be restored. It seemed hardly possible that this could be done while totally refusing the wage requests; presumably there would have to be some threshing out of an intermediate decision that would give reasonable satisfaction to the men and fair recognition to all the other factors involved. But there were no mechanics available for any such determination and it was difficult to know what to do (R. 432-433).

To determine a course of action, Mr. Holtzclaw called into consultation all the top supervisory officers at a meeting in Richmond on May 20, 1937.* The meeting accepted the premises that dissatisfaction existed and that it must be eliminated. For procedure, it did not seem possible to achieve that result in full unless the men should sit down with the management and discuss their respective points of view and participate in arriving at the terms of the decision (R. 432-435).

Bi-partisan negotiation, in other words, was both apparently impending and necessary. The main problem was that

* R. 37-40, 250-254, 266, 276-278, 317, 339-340, 352-354, 372-373, 388 and 432-435. These references cover the following discussion of the meeting, except as additional references are made.

no machinery for any fair or adequate negotiations was available. Certainly it would not be fair to consult with any such limited groups as those which had happened to make the requests or petitions then in hand without giving a fair opportunity to all other groups to be heard and to participate if they should desire. Nor would any such accidental and isolated discussions afford any adequate means for reaching a decision that could be expected to satisfy anybody: even if the petitioners had been organized groups, which apparently they were not, discussion with any one of them would have unloosed a deluge of other requests from other sources. Thus there were at least 9 divisions in the transportation department as a whole and wages in Norfolk and in Richmond had been on the same basis since 1911, so that any change in one city would instantly affect the other (R. 431-432). If the electric department and the gas department were included, there would be a total of between 25 and 50 separate divisions (Intervener's Exhibits 23 [introduced at R. 686] and 34 [introduced at R. 746] and R. *ioc. cit.*). Obviously no such approach could offer any prospect except a disintegration of morale by competitive wrangling among limited groups. So far as management was concerned it afforded no reasonable possibility of any conclusion whatever, but only of interminable discussions with innumerable parties.

The men, of course, were entitled to take such action as they might desire and only the men could decide what in fact they did desire. It was determined, therefore, to lay the problem before them and invite them to take such action as they might desire, if any, and to abide by the result. Whatever the result might be, at least the wishes of the men at large would be evident and that would be the first step toward reaching any suitable solution of the wage requests that had been made. Whether the men decided against any organization or in favor of one or more national organiza-

tions or one or more independent organizations, in any event the management would then know where to take the next step toward adjusting those wage requests.

As for the mechanics of presenting this problem to the men, clearly there could not be a mass meeting of all the employees. The operations of the company are continuous and some men are always at work. Some number less than all would have to be obtained as a sample audience which could broadcast to the remainder. The department heads were accordingly instructed to assemble their respective groups of men*, tell them that Mr. Holtzclaw would make an explanation of their rights and status under the Wagner Act and invite them to select representatives or emissaries to attend. These men were not expected to have any authority to do anything, but merely to act as reporters. The supervisors were to have absolutely nothing to do with this selection of representatives or emissaries by the men, and the men were to be free to do just as they chose about the selection, as to whom they would select or whether they would select anyone.

These instructions were faithfully carried out. The respective department heads in Richmond and Norfolk told their men of the proposed address and advised them that they might select and send representatives, or not, as they saw fit.**

To eliminate any possibility of misunderstanding (R. 44), this address was prepared in writing (Board's Ex. 4, R. 822 [introduced at R. 37]). It was read simultaneously by

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* R. 54-55. Such assemblies had been convened several times a year in connection with sales campaigns, safety talks, Community Fund contributions and similar matters unrelated to labor organizations (R. 524 and 536).

** R. 168-170, 373-376, 388-389, 390-391, 469-470, 477-478, 485, 495-496, 503-504, 515-516, 524-525, 553-555, 563-565, 582-584, 674-676, 695-696, 739-740, 781, 807-808.

Mr. Holtzclaw in Richmond* and by R. J. Throckmorton, Vice President of the company's Norfolk operations, in Norfolk.** The entire text of the address follows (Board Exhibit 4, R. 822 [introduced at R. 37]):

> "A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.
>
> "In a company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.
>
> "This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their

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* R. 36-38, 41-45, 53-54, 98-100, 435-436, 447, 462-463, 468-469, 740-741, 790-791; Intervener's Ex. 20-B, R. 915 [introduced at R. 660]. Mr. Holtzclaw presided at this meeting. Mr. Wood, Vice President, and Mr. Moore, Vice President and General Counsel, attended. No other persons in a supervisory position were present.

** R. 254-257, 266-267, 278-285, 286, 311-312, 317-319, 340-341, 347-348, 353-354, 376-377, 468-469, 634-637, 660, 695-696, 714, 807; Intervener's Ex. 20-A, R. 914 [introduced at R. 660]. Mr. Throckmorton presided. Mr. M. C. Smith, Vice President, Mr. Jones, Vice President, and Mr. Miller, Norfolk counsel for the Company, attended. No other persons in a supervisory position were present.

own choosing, as provided in the Wagner National Labor Relations Act, which provides as follows:

> 'SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.'

"The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

"The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this bargaining in such an orderly manner.

"The Wagner Labor Act prohibits a company from 'dominating or interfering with the formation or administration of any labor organization or contribute [*sic*] financial or other support to it.'

"In view of your request to bargain directly with the Company and, in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select

> your own officers and adviser, adopt your own by-laws and rules, and select your representatives to meet with the Company officials whenever you desire."

Mr. Holtzclaw made no comment on or explanation of the address, except that at its conclusion he

> "explained to the employees that, in plain everyday English, that statement said that they had a right to do whatever they saw fit to do, and their actions must be determined by their own judgment; that neither the Company nor any of its officials or executives were to interfere with them in the slightest degree in arriving at a conclusion as to whether they wished collective bargaining with the Company, and if so, how they wished to carry out the collective bargaining" (R. 43).

Mr. Throckmorton gave no comment or explanation. In both meetings a few questions were asked, which are fairly summarized by the Board's finding that

> "Employees asking whether they had to join a labor organization and what kind of an organization they should form were told they need join none and were refused advice as to the type of organization they should adopt" (R. 964).

In one particular the Richmond meeting differed from the Norfolk meeting. As above stated, the officers had come to feel, after considering the various petitions that had been received, that some increase in wages would probably be necessary, although of course the amount was not predictable, before any final solution of those various requests could be ultimately found. While this was their guess or belief, no decision whatever had been reached in regard to it, even as to any recognition of that possibility. As Mr. Holtzclaw advanced to the platform to make his speech he concluded that some statement on that subject should be made. After reading his speech he said that if any increase in wages

should be made, either as a result of any collective bargaining that might be conducted in the future, or without any such bargaining as a decision by the company itself*, such increase would be made effective as of June 1st, one week from that day. He knew that the number of employees was large and their locations numerous, there being about 3,400 employees, in about 50 possible units in various communities in tidewater Virginia and northeastern North Carolina, and that it would take some time for the men to reach their decision; his purpose in making the statement was that the men should have an adequate opportunity for deliberate choice as to the decison they desired to make and not feel that there was any reason for hurried action (R. 53, 435). There was no promise of any kind that any increase would ever be made (R. 435-436).

The officials then withdrew from each meeting, permitting the men to remain for discussion if they desired.**

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*These alternatives, and the independence of the wage increase from collective bargaining, were clearly stated by the witness (R. 53, 435, 443). The Board's brief (pp. 9 and 21) chooses to mention only one of these two alternatives. There was no promise, as the Board's brief chooses to urge; the Board's Decision did not find any promise and the absence of any was proved by overwhelming evidence (R. 267, 284-285, 319, 435-436, 447).

**Though subsequent conduct of the employees is dealt with in Section 5 below, it should be noted that the Board's brief here misstates the action taken by the employees who remained as being to elect a "general chairman to push this thing into an organization" (Board's Brief, p. 22). This was not found by the Board. More credible testimony (R. 763) was that the only action was a decision to

> "report back to our various groups what we have heard and at some subsequent time to get together again and see what the reaction had been upon the people we were representing" (R. 742; and see R. 928).

Similarly in Norfolk it was decided to report back to the men in order to

> "see what they wanted to do about it; whether they wanted to form an organization, or what kind of an organization they wanted to form . . ." (R. 586).

The Board unfairly distorts this address by subtle selection of scattered phrases. No skill of colored rearrangement, however, can obscure the company's unequivocal effort (p. 20 above)

> "to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make."

Unequivocally, therefore, the company was willing not only to discuss any current problems with any of the men, as had been stated in the bulletin of April 26th, but also to bargain collectively in an orderly manner with any organization, if any, that the employees might desire irrespective of any limitations on the scope of the statute. Clearly what was said neither expresses nor suggests any preference by the management for any particular kind of organization as opposed to any other kind, but that choice was left wholly to the men conformably to the policies declared in the Act. The company's desire was to erase any impression, if any existed, that the men were not free to do as they wished, and any impression, if any existed, that the company was opposed to their joining any labor organization, and to tell them that the company did not want to influence them for or against anything that they might wish to do (R. 311-312). In express terms it was announced that whatever the majority of the employees should decide would be accepted by the company and no employee would be discriminated against because of any choice that he might make. The only limitation was that the results of that choice should be such as to make possible a practical determination of the questions in issue.

There is no basis therefore for any finding that the words of the address in any way obstructed free organizational

choice by the men. Nor is there any basis for such a finding, as the Board attempts, in respect of "the mechanics" of the May 24th meetings (R. 965). It is absurd to claim, as the Board does, that the mere utterance of words by a supervisory officer to "delegates" from the employees who had not been authorized to take any action

> "converted the delegates, isolated from their constituents and under the immediate influence of the officials, into virtual representatives of the employer among the employees who had elected them" (R. 965).

If this, apparently the main ground of the Board's position, were sound, then no employer could say anything of any character relating to organizational questions to any group of employees less than all, or perhaps even to all employees, without making the auditors "virtual representatives of the employer" and thus automatically violating the Act. By the same token no choice of the men on organizational questions, no matter how hearty or widespread, could culminate in a lawful organization, if such men or any of them had once been subjected to the paralyzing mechanics of a statement by the employer, irrespective of what position on organizational matters that statement might have taken.

Certainly the Act was not drawn for the embroidery of such theological niceties. Its subject matter as well as its judicial interpretation plainly show that it was a practical statute intended for the exigencies of practical living and to be interpreted in accordance with average understanding. When viewed in that light there can be no doubt that the address did nothing except present the pending problem to the men and leave such action as might be taken entirely to their own wishes. If it be suggested that the problem in itself invited the taking of some action by the men, there can be no reasonable claim that the address indicates any

preference as to the character of any organization that might be formed. On the contrary, it gave a clear assurance that whatever a majority of the employees should decide would be accepted by the company and no employee would be discriminated against because of any choice that he might make.

So, the court below was clearly right in summarizing the May 24th meetings as follows:

> ". . . in the address of the president, the right of the employees to select representatives of their own choosing was made abundantly clear, and . . . the duty of the company and its officers to refrain from interference was properly emphasized; and we see nothing either in the address or in the surrounding circumstances from which the employees could have gained any contrary impression. No hostility towards any outside union was manifested; and, while the Board stresses the concluding paragraph of the address, there is certainly nothing in it, or in any other part of the address, to indicate a desire that the organization to be set up by the employees be not affiliated with an outside organization. On the contrary, the rights of employees were stressed by direct quotation from the labor act and the employees were expressly assured that the company was willing to bargain with them in any manner satisfactory to the majority, that no employee would be discriminated against because of labor affiliations and that the company was prohibited by law from dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it." (R. 1014).

4. The Board's Findings as to the April 26th Bulletin and the May 24th Meetings are Contrary to the Intention of the Act and the Requirements of the Constitution.

(a) THE ACT

The Board makes no finding of any threat of restraint, oppression or coercion in the event of non-action by the employees or of action by them contrary to what the Board asserts to have been the wishes of the company. No such finding could be made because each of the documents in question makes it unequivocally plain that no such result would follow. The bulletin specifically stated that "The company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the company." The address specifically stated that "no employee will be discriminated against because of any labor affiliations he desires to make." When this bulletin was posted throughout the properties and confirmed within a month by a public address of senior executives, there could be no possible uncertainty on the part of any employee as to his entire liberty of choice.

It has been submitted above that on any fair analysis of the bulletin and the address, neither contains any indication of partisan feeling by the management. Even if it were true, however, which it is not, that either one or both of these documents suggested a personal preference on the part of management, it would still be true that such a suggestion in such a context could not constitute an unfair labor practice within the meaning of the Act. The Act is designed to prohibit conduct on the part of an employer which overrides the will of the employee. Of course in determining whether specified conduct is sufficient to override the will of the employee, matters of degree are to be consulted. In any schedule of degree, however, a line must ultimately be

drawn. That line would lie short of the unreasonable assertion that an unfair labor practice is committed by such a suggestion in contexts which leave it undebatably clear that the employee has a right to do as he wishes and will be respected and protected in the exercise of that right.

This point of interpretation was clearly determined by this Court in respect of the Railway Labor Act (*Texas & New Orleans R. Co.* v. *Railway Clerks*, 1930, 281 U. S. 548, 568):

> " 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis. Virginia* v. *Tennessee*, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the a[illegible] of relation or opportunity so as to corrupt or ove[illegible] the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known application of the law with respect to fraud, duress and undue influence."

In looking back to settled prior meaning for the interpretation of new statutes this Court was following customary practice. Thus more recently the Court, in *Case* v. *Los Angeles Lumber Products Co.*, 1939, 308 U. S. 106, held that the words "fair and equitable" had acquired a settled meaning in prior equity jurisprudence and that when the Congress embodied them in Section 77B of the Bankruptcy Act it thereby adopted the pre-existing standard.

That principle of interpretation and the decision of this Court in the case of the Railway Clerks are particularly apposite here for that decision was a leading case at the time the Act was under consideration and the Railway Labor Act was direct source material for the Act. Not only are the Railway Clerks Case and the Railway Labor Act profusely cited in the committee reports underlying the Act,* but the Senate Report (p. 9) declares that Section 2 of the Railway Labor Act has "identical objectives" with Section 8(2) of the Act, and both of the two House reports characterize Section 2 of the Railway Labor Act as "the counterpart" of Section 8(2) of the Act (May 2d report, p. 9 and May 21st report, p. 15). The House report of June 10 (p. 3) adds that

> "... the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by Section 7a of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern".

All these reports, moreover, assimilate a violation of Section 8(2) with "overriding the will of employees" (Senate Report p. 10; House Report May 21st p. 17; House Report June 10th p. 19).

Because of the views quoted on page 25 above (that the company's declarations were neutral), the court below did not feel that it was necessary to confront the point dealt with in this section. But on the point dealt with in this section, the court below felt that the decision in the Railway Clerks' Case was applicable and decisive (R. 1013). It did not purport to invoke any wider or less established criterion.

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* 74th Congress, First Session, Senate Report 573, May 2, 1935, pp. 9, 13, 14, 17; House Report No. 972, May 21, 1935, pp. 7, 13, 15, 16; House Report No. 1147, June 10, 1935, pp. 3, 9, 15, 16, 17, 18 and 19.

The application under the Act of this standard from the Railway Clerks' Case is not unique to the case at bar but represents the general view both of the court below and of other Circuit Courts of Appeal.

Thus in *L. Greif & Bro. Inc.* v. *N. L. R. B.*, 1939, 108 F. (2d) 551, the court below was faced with a factual situation where management had pretty plainly indicated a preference for an unaffiliated union but made it clear that the employees had complete freedom of individual choice (108 F. (2d) at 553-4 and 555). The court held that such statements could not be found to be an unfair labor practice, saying (at 557-558):

> "The real query is whether the management has interfered or taken part in the formation of the new body. It is not an answer to point to circumstances indicating that the management preferred an inside to an outside union, . . . It goes without saying that the determination of the employees to form their own association and to be free from the outside interference of a national union was influenced by their past experience in the plant. . .; but these contacts did not deprive them of their rights under the Act or require them to choose bargaining representatives offensive to their employer . . ., so long as their choice was not dominated or interfered with by the employer" [here quoting from the *Ballston-Stillwater Knitting Co. Case* as below on the meaning of domination and interference.]*

*This is in no way inconsistent with the condemnation by the same court of the "Sasser statement" (*System Federation No. 40* v. *Virginian Railway Co.*, 1935, E. D. Va., 11 F. Supp. 621, 624-5) in *Virginian Railway Co.* v. *System Federation No. 40*, 1936, 84 F. (2d) 641, 644, affirmed on other grounds, 1937, 300 U. S. 515 (cited Board Brief p. 31). That was a violent attack on unions and union membership. Nor is the cited decision inconsistent with *American Enka Corp.* v. *N. L. R. B.*, 1941, CCA 4, 119 F. (2d) 60 (cited in Board Brief, p. 32) for the statement there embodied a clear threat of discharge. It is of interest that the statements in both those cases

The same court has again more lately said:

> "Some latitude in the discussion of labor matters must be conceded to an employer. He may express an opinion if it carries no threat of discrimination and does not interfere with the attempts of his employees to organize." (*N. L. R. B.* v. *Clarksburg Publishing Co.*, 1941, 120 F. (2d) 976, 979)

The Circuit Court of Appeals for the Second Circuit laid down a similar criterion in *Ballston-Stillwater Knitting Co.* v. *N. L. R. B.*, 1938, 98 F. (2d) 758, 762:

> "To constitute domination or interference by the employer we think that it must appear that the employees are acting for him rather than for themselves, or that the employer in some manner gives aid to one group which he withholds from the other, or discriminates in favor of members of a labor organization or against non-members."

A vigorous presentation of the negative right not to join any union was held by the Circuit Court of Appeals for the Third Circuit not to constitute in itself a violation of the Act (*N. L. R. B.* v. *Blossom Products Corporation*, 1941, 121 F. (2d) 260, 261).

A specific decision on the point at issue was made by the Circuit Court of Appeals for the Sixth Circuit in *Midland Steel Products Co.* v. *N. L. R. B.*, 1940, 113 F. (2d) 800, quoted at p. 35 below. This view was approved and carried further by that court in *N. L. R. B.* v. *Ford Motor Co.*, 1940, 114 F. (2d) 905, cert. den., 1941, 312 U. S. 689.

With equal particularity the Circuit Court of Appeals for

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were condemned in opinions by the same Judge who wrote the opinion below. A discharge threat was also embodied in the statement involved in *N. L. R. B.* v. *Elkland Leather Co.*, 1940, CCA 3, 114 F. (2d) 221 (cited Board's Brief p. 31).

the Seventh Circuit said in *Jefferson Electric Co.* v. *N. L. R. B.*, 1939, 102 F. (2d) 949, 956:

> "In the instant case there were no threats so as to intimidate the employees into joining a particular labor organization against their will, and there is no evidence in the record which would warrant a finding that the conduct of the company was indicative of coercion or intimidation. To us it is clear that the company had come to a realization that its plant was about to be unionized. It had for many years maintained friendly relations with its employees and desired that such relations continue. It was in this spirit that it allowed the use of the cafeteria and other plant privileges. Such acts, standing alone, are not inconsistent with a strict 'hands-off' policy. It was never the intention of Congress to prohibit friendly intercourse between employers and labor organizations, to curtail freedom of speech, to deprive an employer of his right to express an honest opinion or to outlaw the extension of common courtesies. It is more in keeping with the purpose of the Act to foster such friendship rather than to condemn it."

Summarizing, the court added (pp. 956-7):

> "But while it is true that employer leadership through supervisory employees is condemned by the Act, and that pressure overriding the will of the employees, as a means of encouraging or discouraging membership in any labor organization, constitutes interference with a worker's right to select his representative, it does not follow that the mere showing of a preference and acts of cooperation constitute interference with an employee in his exercise of the rights guaranteed under the Act."

More lately that same court has said:

> ". . . a mere showing of preference does not constitute unlawful interference with an employee in the exercise of his rights under the Act. It is only when such asserted preference, with all surrounding facts and circumstances, amounts to improper influence and approaches a coercive character that it is to be condemned." (*Diamond T Motor Car Co.* v. *N. L. R. B.*, 1941, 119 F. (2d) 978, 982)

A similar decision by the same court is found in *N. L. R. B.* v. *Gutmann & Co.*, 1941, 121 F. (2d) 756.

To the same effect the Circuit Court of Appeals for the Ninth Circuit said in *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 1938, 99 F. (2d) 153, 178-9:

> "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do it would be in violation of the First Amendment, U. S. C. A. Const. Amend. 1. The right of workers to organize freely must be conceded. It is a natural right of equal rank with the great right of free speech, protected by the Constitution. But the right of the workers to organize is not destroyed by expressions of opinion of the employer or employee, such as referred to above. The case is different where the employer makes use of threats to prevent organization."

The Court of Appeals for the District of Columbia has taken a similar position:

> "The labor law does not prohibit the right of opinion on the part of the employer, nor the expression of it . . .
> "Before oral statements of an employer may be held to be an unfair labor practice, it must appear that they

> interfered with, restrained or coerced employees in the rights guaranteed by the Act, that is to say, the right to join labor organizations, to bargain collectively and to engage in concerted activities. But nothing that Lewis is quoted as having said, nor the surrounding circumstances, conveys the idea that the employees had anything to fear because of their union activities" (*Press Co.* v. *N. L. R. B.*, 1941, 118 F. (2d) 937, 942, cert. den., 1941, 61 S. Ct. 1118).

The standard of the Railway Clerks' Case has therefore been adopted and followed in at least five of the Judicial Circuits and in the District of Columbia.

This standard is not in conflict with the Court's statement in *N. L. R. B.* v. *Link-Belt Co.*, 1941, 311 U. S. 584, 600:

> "Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge."

The issue here is not subtlety against perspicuity. The whole question is the nature of the substantive message, whether declared in household words or implied by any form of indirection. In the *Link-Belt Case* there were declarations of actual hostility to unions, admitted discharges for union activity and no statement whatever of neutrality. So indications of employer preference implied possible loss of employment for going against that preference. Here, however, the men have been repeatedly and unequivocally assured of their complete independence of choice and of their complete freedom from discrimination because of any choice they might make. The restraining effect of the preference disclosure which the Court properly found in the facts of the *Link-Belt Case* can not therefore exist among the facts here presented.

Neither the April 26th bulletin nor the May 24th address carries any suggestion of a threat or of other interference

with complete liberty of individual choice on the part of the men, but on the contrary both expressly leave the choice entirely to them. It must, therefore, follow *a fortiori* from the Railway Clerks' Case and the other decisions cited above that as a matter of the proper interpretation of the Act neither communication affords any basis for a finding of unfair labor practice; on the contrary, the Board's conclusion that these communications were unfair labor practices either has no basis or depends upon an inadmissible interpretation of the Act; and the Board's order, so far as dependent on those two communications, was therefore properly set aside.

(b) The Constitution

The foregoing interpretation of the Act has been rested on (1) the adoption by Congress of terms having well-known meanings in prior jurisprudence, (2) the practical purposes of the Act and (3) the interpretation of the similar terms of related statutes by this Court and the interpretation of these particular terms of this statute by various Circuit Courts of Appeal. More, however, is involved than a mere question of statutory construction. Important constitutional rights are in issue. If the Act were interpreted or applied to condemn a statement of preference without any threat of coercion but in a context leaving complete liberty of individual choice, the result would be so unreasonable, so extreme, so excessive in relation to the public purposes of the Act and so drastic a restriction on the right of employer self-expression as to be unlawful under the First Amendment to the Federal Constitution.

The Court has recently given solemn emphasis to the importance of the constitutional right to freedom of speech and has held that a State may not abridge the individual liberty of those who wish to speak their mind on religious

matters (*Schneider* v. *State*, 1939, 308 U. S. 147, 160) or on labor disputes (*Schneider* v. *State, supra*; *Thornhill* v. *Alabama*, 1940, 310 U. S. 88; *Carlson* v. *California*, 1940, 310 U. S. 106). The same test applies to Federal action (*Schneider* v. *State, supra*, at p. 160).

Applying these principles directly to the Act, the Circuit Court of Appeals for the Ninth Circuit has said that it could not be interpreted as forbidding a statement of employer preference unaccompanied by threat of coercion, because if Congress had attempted to enact a law of such meaning, "it would be in violation of the First Amendment" (*N. L. R. B.* v. *Union Pacific Stages, Inc., supra*). To the same effect the Circuit Court of Appeals for the Sixth Circuit held as follows (*Midland Steel Products Co.* v. *N. L. R. B.*, 1940, 113 F. (2d) 800, 804):

> "The finding of the Board that the comment of the general superintendent that the men in petitioner's Detroit plant were 'disgusted with unionism' constituted evidence of interference, restraint and coercion, raises the question whether any and all statements derogatory to unions are prohibited by the Act. It is not claimed that the comment was coupled with any threat of discrimination or loss of employment. It did not interfere with or restrain attempts to organize, nor did it attempt to do so. The comment may have been either a statement of fact or an expression of opinion, or a statement embodying both elements. But neither statement of fact nor expression of opinion by the employer is prohibited by the statute, and if they were, the statute would contravene the free speech provision of the First Amendment. Bearing in mind that 'the dissemination of information concerning facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution' (*Thornhill* v. *State of Alabama*, 60 S. Ct. 736, 744, 84 L. Ed. 1093, decided by the United States Supreme Court April 22,

> 1940), we think the same principle applies *a fortiori* with reference to this simple conversation wholly lacking in any element of threatened discrimination because of union membership or activity. Unless the right of free speech is enjoyed by employers as well as by employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person. The use of influence amounting to interference, restraint or coercion plainly is illegal. *Cf. Texas & New Orleans Rd. Co.* v. *Brotherhood of Railway & Steamship Clerks, supra.* But where no such element exists, the employer is not precluded from conversing with employees about labor questions."*

This view was approved and carried further by the same court in *N. L. R. B.* v. *Ford Motor Co.*, 1940, 114 F. (2d) 905, cert. den., 1941, 312 U. S. 689.

An interpretation which would make a statute unconstitutional is to be avoided** and of course an unconstitutional application of an act is not admissible. Constitutional considerations thus confirm the conclusion already reached on other grounds, that the Act can not forbid an indication of employer preference unaccompanied by threat

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* To the same effect it is said in 1 Bill of Rights Review, 1940, p. 46:

> "There may, of course, be unconstitutional applications of a constitutional statute. And an attempt on the part of the Labor Board indiscriminately to prohibit any and all expressions of employer opinion, or to label 'coercive' even an honest statement of the employer's point of view backed by no express or implied threat of other tactics would seem clearly unconstitutional."

But see *N. L. R. B.*, v. *Reed & Prince Mfg. Co.*, 1941, CCA 1, 118 F. (2d) 874, 889, cert. den., 61 Sup. Ct. 1119; *N. L. R. B.* v. *Federbush Co., Inc.*, 1941, CCA 2, 121 F. (2d) 954, 956; *N. L. R. B.* v. *New Era Die Co.*, 1941, CCA 3, 118 F. (2d) 500, 505.

** *U. S.* v. *Delaware and Hudson Co.*, 1909, 213 U. S. 366; *U. S.* v. *Standard Brewery*, 1920, 251 U. S. 210; *Texas* v. *East Texas R. R. Co.*, 1922, 258 U. S. 204; *Bratton* v. *Chandler*, 1922, 260 U. S. 110; *Panama Railroad Co.* v. *Johnson*, 1924, 264 U. S. 375.

of coercion and an order based on any such construction was properly set aside.

5. Organization of the Independent

(a) Position of Management

The officers of the company did not know and were never informed of what occurred after they left at the Richmond meeting of May 24th or at the Norfolk meeting on the same day (R. 45-46). They made no effort to ascertain what, if anything, the men were doing in regard to any matter of labor organization and had no knowledge as to any such matters except a request on June 14th by one of the Norfolk car operators for separate bargaining with a part of the Norfolk transportation employees* and a request by an employee committee on June 15th for a list of employees.**

Indeed the management's attitude was just the opposite of interrogation or partisanship. At the consultation of department heads in Richmond on May 20th, which has already been described, instructions were issued, and directed to be transmitted to all subordinate officials to and including foremen, that no person in any supervisory position should interfere or assist, or attempt to advise or influence em-

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* R. E. Elliott, Jr., a bus operator, who is commented on further below. This request was declined by Mr. Holtzclaw, saying that the company's attitude had already been stated in the May 24th address and he could not "in fairness to the Company or to the employees" deal with any such small group constituting a part of the transportation employees in Norfolk. R. 60, 256-259, 436-438, 445-446 and 447-448.

** The committee was designated as "Steering Committee for the Richmond Division for the proposed 'Independent Organization of Employees of The Virginia Electric & Power Co.'" R. 289-290, 457, 752, 757-758; Board's Exhibit 39, R. 855 [introduced at R. 458]; Board's Exhibit 40-A, R. 857 [introduced at R. 459]. This list was supplied and the Company was paid for the cost of its preparation. Mr. Holtzclaw testified that a similar list would have been given to any one requesting it in connection with any effort to organize the men, either to the AFL or the CIO or any one else, but in fact no such request was received from any one else. R. 457.

ployees, in any way whatever regarding any choice or activity of organization. Normally one instruction suffices. As a result, however, of the questions which were asked in the May 24th meetings, the officers thought it likely that foremen or superintendents might be pressed for advice or comment on the question of labor organizations. To be absolutely sure that there should be no communication even in this way between the men in supervisory positions and those not in supervisory positions, further meetings of the supervisory personnel were held in Richmond and in Norfolk on May 25th to repeat and emphasize the original instructions. All department heads and sub-department heads were instructed that every person in any supervisory position must strictly refrain from any action or communication that might conceivably influence any thought or action on such matters by the men, that these instructions must be carried out to the letter and that they must be transmitted down to and including all the foremen.* As a part of these instructions, the supervisors were definitely told that company property should not be used by any labor organization of any kind and that no labor organization should be permitted to solicit membership on company property or in working hours (R. 289). These instructions were promptly handed down to the subordinate supervisors.** No instance of any violation of these instructions ever came to the officers' attention, nor did they ever receive any complaint of any such violation until made by the Board.

These instructions were substantially reiterated by a public notice to all employees on June 24th. A newspaper article that morning*** carried a statement by a CIO or-

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* R. 257-258, 267, 285-289, 319-320, 341-343, 354-355, 413, 455-456.

** R. 389, 397, 418, 425-426, 477-478, 481, 482, 484, 485, 495-499, 500, 502-503, 506-507, 509-514, 516-517, 525-526, 550, 555-556, 564-565, 569-570.

*** Richmond *Times Dispatch* of June 24th, Respondent's Ex. 11, R. 871 [introduced at R. 247].

ganizer that the company had offered Elliott a fine job in North Carolina to leave Norfolk and "turn over his organization to the Company." Of course no such offer or suggestion had ever been made to Elliott.* To clear up that untruthful accusation a bulletin was immediately posted over Mr. Holtzclaw's signature throughout the properties (R. 438 and Respondent's Exhibit 7, R. 860 [introduced at R. 137, 248]). After denying the accusation** the bulletin said:

> "Employees of Virginia Electric and Power Company have a right to self-organization, to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing, and the Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively."

Thus the absolute organizational liberty of the men was announced three times, at intervals of almost exactly one month, in April, May and June.

Beyond these facts the management had no further knowledge. At the hearing, however, the Independent intervened and introduced over 1800 pages of evidence and about 60 exhibits. The history of its creation is consequently available in microscopic detail. Some outline of that history, which is dealt with so cursorily in the opinion of the Board and in its brief, must be examined to see the actual tone and tenor of what was taking place. Its importance justifies review at some length, particularly in view of its non-controversial nature, since *no fact asserted in all of the following sub-section (b)-(i) is controverted by any contrary finding of the Board.*

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* R. 320-324, 343-345, 358, 383, 390-392, 436-438.

** It was shown at the hearing that *Elliott* had never made any such statement (Respondent's Exhibit 7, R. 860 introduced at R. 137, 248]; and R. 137-138, 391-392 and 413).

(b) Employee Meetings, May 25th-June 1st

(1) NORFOLK

(i) *Distribution Department*

Among those who attended the Norfolk meeting addressed by Mr. Throckmorton on May 24th, were Faust, a lineman (R. 574, 582-586), Brown, a cable splicer (R. 674, 675-676), Morris, a line trouble shooter (R. 695-696), Tatem, a power station switchboard operator (R. 703-704, 714-715), and N. R. Jones, also a power station switchboard operator (R. 721-722), all being non-supervisory employees. After the officials left that meeting, all the men started talking at once and there was no organized discussion but only confusion (R. 586-587, 636-638, 676, 704, 714). In that state of affairs, one of the employees, Nicholson, an employee in the credit department, attempted to bring the meeting to order and Tatem moved that they adjourn and report back to their several groups, see what the others wished to do and meet again on June 1st (R. 586-587, 637-638, 704).

After the adjournment, Brown and Faust discussed briefly getting the men in their department together to see if they wanted an organization and if so, what kind of an organization (R. 587). The next day, May 25th, Faust talked to a number of the men in the line department (R. 587). At Brown's suggestion a meeting was arranged for the purpose of making a report as to the May 24th meeting, to all the men in the distribution department. Brown told Mr. Crafton, Superintendent of Distribution in Norfolk, that the men desired to hold a meeting about their usual quitting time at 4:30 in the afternoon and requested that none of the men be required to work overtime, so that they might attend such meeting. Crafton issued the requested instructions, but did not order the men to attend such meeting nor did he know where the meeting was to be held. In fact the meeting was

held at the Company's Cove Street garage, but no permission was given for its use. No supervisors were present at the meeting. Almost all the men in the Distribution Department were there. Brown was elected chairman. Faust was first elected secretary but when he declined, N. F. White, an employee in the distribution department, was elected secretary of the meeting. There was no voting for the election of representatives or for the establishment of an organization, but a vote was taken on the question of what kind of an organization the men desired. Brown asked the men whether they wanted a "collective bargaining plan," which meant without affiliation with any outside organization, or CIO or AF of L. 153 were cast, with the following result: CIO—20; no outside affiliation—6; "collective bargaining"—126; and "nothing"—1. After the count the ballots were burned. Written minutes were kept of the meeting.* Before the close of the meeting Brown was given a written designation by a majority of the employees present as their representative in the matter of "collective bargaining."** There were 171 signatures to this designation (Intervener's Ex. 3-A-G, R. 888 [introduced at R. 591]) compared with a total of 233 employees in the entire Distribution Department of the Norfolk Division (Board's Ex. 40-B, R. 857 [introduced at R. 459]).

(ii) *Generating Department*

One of the men attending the May 24th meeting from the Norfolk Generating Department was, as already stated, N. R. Jones, a switchboard operator. As a result of suggestions

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* Intervener's Ex. 3-F, R. 888 [introduced at R. 591]; R. 587-594, 638-642, 643, 668, 671-672, 676-679, 687-688, 694-695, 696-697, 814-815.

** Intervener's Ex's 3-A-G, incl., R. 888 [introduced at R. 591], R. 587, 589-590, 638-644, 676-678, 687-688.

from his fellow employees, who seemed to want him to take the lead, he called a meeting of the power plant employees on May 27th to inform them of the May 24th meeting and obtain an expression of their views. This meeting was held in the auditorium at the Reeves Avenue Station. That is a recreational room for the employees, which they had equipped with a pool table, kitchen equipment and similar facilities; they did not consider permission necessary for its use (R. 719-720). Jones did in fact ask Mr. Davis, the plant superintendent, if there would be any objection to using the auditorium for a meeting, but did not mention its purpose. There were 40-50 men present, a majority of the production operating men. The men voted between AF of L, CIO and an independent organization. They voted unanimously for the last and elected a committee consisting of N. R. Jones and Tatem in order to set up an organization of that kind (R. 704-705, 722-723, 727-728, 733, 736-737).

(iii) *Transportation Department*

Meetings of the car and bus operators were called by Elliott to meet on May 28th in the Company Y.M.C.A.* They decided not to affiliate with the AF of L or the CIO but to have an independent organization.** The next day they elected a committee of representatives and the Portsmouth car and bus operators unanimously voted in favor of the same organization.***

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*Quarters maintained in part by dues paid by the men; include recreational facilities, shower baths and barber services; regarded by the men as in large measure their own premises (R. 327-328 and 789).

** Statement by Elliott in Norfolk *"Virginian Pilot"* of May 28, 1937 (Respondent's Exhibit 11, R. 862 [introduced at R. 247]).

*** Statement of Elliott in Norfolk *"Virginian Pilot"* of May 29, 1937 (Respondent's Exhibit 11, R. 863 [introduced at R. 247]).

(iv) *June 1st Meeting of all Departments*

By June 1st, a week after the May 24th meetings, most or all of the various departments in Norfolk had heard a report of the May 24th address and designated, with varying degrees of formality, representatives to attend a joint meeting on June 1st to consider further action. This meeting was held in the auditorium of the general office building but, so far as the record shows, without any permission. Some 70-80 men were present, representing all departments. Most of them had authority to try to form an independent organization (R. 687-688) and some of these authorizations were in written form like Brown's (R. 687). The meeting, however, was open to all employees. Elliott proposed an Employees Association of Committees, or EAC, to be headed by a salaried Director with sweeping authority, removable only "by due process of law," and explained it with a blackboard lecture. This was the principal subject of discussion and no form of organization was agreed upon.*

(2) RICHMOND

(i) *Distribution Department*

After the departure of the officials from the May 24th meeting in Richmond there was disorganized discussion among the employees who remained (R. 741-742, 782, 790-791, 792-793). The men nominated an employee Paige as chairman to conduct the meeting, but he declined and they elected Holzbach, a clerk in the meter department (R. 741-742, 791). He did not seek the chairmanship (R. 791) but felt that as a representative of his group he should report on the May 24th meeting to his fellow employees (R. 791). The next day he induced Mr. Walke, a superintendent, after

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* Intervener's Ex. 4, R. 889 [introduced at R. 592]; Faust, R. 592-594, 633-634, 643-645; Tatem, R. 704-705; Morris, R. 697; Brown, R. 678-679, 688; Hough, R. 801; Reutt, R. 71-73, 86-89; Elliott, R. 107-110, 123-124; Rountree, R. 806-807; Parke, R. 807.

some difficulty, to permit him the use of the auditorium in the service building for two meetings of employees for the purpose of making such a report (R. 742-743, 791-792, 795-798). In each resolutions were adopted as follows: (1) to have a union of some kind; (2) not to join the AF of L or the CIO; (3) to have an independent organization. The vote for an independent organization was almost unanimous in each meeting. No one at either of the two meetings indicated by any statement a belief that the Company had any preference whatever. They agreed to hold another meeting on June 1st and elected Staughton, a construction employee, and Bertolett, a distribution engineer, as representatives to attend (R. 739, 742-744, 787, 795-797).

(ii) *Generating Department*

Roberson, an electrician, attended the May 24th meeting with several others from his department (R. 780-782). The next day he reported to a meeting of employees in the Power Station and was asked to represent them. He caused some ballots to be prepared by his brother, who was employed elsewhere, bearing the question: "Do you wish the CIO organization, the AF of L organization, an independent organization or no organization?" These ballots were delivered and collected at the houses of most of the men by automobile. The remainder of the men filled out the ballots at the plant. The result of the balloting was: CIO—22; AF of L—1; independent organization—93; no organization—7 (R. 782-783, 784, 787).

(iii) *Transportation Department*

Edwards* was elected by the Richmond transportation employees on May 24th as their representative to attend the meeting that night (R. 808-809). He reported to his fellow

* Not the Supervisor Edwards (at Norfolk) discussed below.

employees on May 25th at a meeting at the car barns and at that time it was voted to form an independent organization. These employees at once proceeded to engage their own quarters for office and meeting rooms and contributed the money to pay all the expenses (R. 809).

(iv) *June 1st Meeting of all Departments*

Holzbach sent out notices for the June 1st meeting (Intervener's Ex. 32, R. 928 [introduced at R. 754]), addressing them to the various representatives who had been chosen (R. 744, 791-792) in informal elections among the men. This group was styled for the first time then, or shortly thereafter, a Steering Committee. The meeting was held in the service building, the use of which for organization purposes Holzbach knew would not be permitted by the company (R. 798). Underwood, an assistant engineer, was elected chairman and Bertolett was elected secretary. The principal decision was to appoint Underwood, Bertolett and an employee named Clarke as a committee to see what was being done in Norfolk and to select a lawyer to draw up "a constitution and plan of organization for the desired association of Va. Elec. & Power Co. workers" (Intervener's Ex. 33, R. 928, 930 [introduced at R. 745]; and R. 744-745, 763-765). The sentiment was overwhelmingly in favor of an independent organization (R. 773-776, 783). This sentiment and the events of the week in Richmond are summarized as follows in the minutes (Intervener's Ex. 33, R. 928-929 [introduced at R. 745]):

> "In the course of the ensuing week, the various delegates reported to their respective Departments on the discussion in the meeting of May 24, and endeavored to obtain an expression of the attitudes of these Departments toward the issues involved. In each instance, the workers felt that for the protection of their interests they should organize in conformity with the pro-

visions of the 'Wagner Act' and other pertinent legislation. Also, the workers emphatically desired that such an organization should be instituted among themselves, that it consist only of Va. Elec. & Power Co. employees who would act only for themselves, and that there be no outside aid or interference whatsoever."

(c) JOINT MEETING AT PETERSBURG ON JUNE 3RD

There was no cooperation between Richmond and Norfolk before the June 1st meetings (R. 688, 715, 728). The next day Underwood, pursuant to the action at that meeting, got in touch with friends of his in Norfolk and arranged a joint meeting for the night of June 3rd in Petersburg, an intermediate point.*

There were 12 representatives at the meeting, 3 from Richmond and 9 from Norfolk (Board's Ex. 19, R. 839 [introduced at R. 111, 248]; and R. 755-756).**

Elliott submitted his plan for EAC and asked that it be adopted forthwith but the other representatives disapproved. The only affirmative business was to agree on the employment of a lawyer to draw up organization papers, their form being left to his judgment.*** After discussion of a lawyer from Richmond or a lawyer from Norfolk or a lawyer in each place, it was agreed to engage one in Petersburg as a

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* R. 723, 745-746, 765 and Intervener's Ex. 34, R. 931 [introduced at R. 746].

** These had a broad coverage of representation: Thus, Underwood for the Richmond General Office employees (R. 761-762) and Bertolett for the Richmond Installation Department (R. 744); Tatem for the Norfolk Operating and Maintenance employees (R. 706); Brown for the Norfolk Distribution employees (R. 587-588, 679-680); Morris for the Portsmouth linemen (R. 697-698); Elliott and Hough for the Norfolk Transportation men (Board Ex. 19, R. 839 [introduced at R. 111, 248]); and Gregory and Walsh for the Norfolk Gas Department (R. 705-706).

*** R. 110-112, 124-125, 679-680, 688, 697-698, 707, 715, 755-756, 766, 776.

neutral point and a committee was appointed to obtain Mr. Bohannan, if he was available, and otherwise William Earle White. Neither of those persons has, or has ever had, any connection whatever with the Company.

Promptly after this meeting the committee called on counsel in Petersburg and asked them to assume the task of formulating a constitution and by-laws for the organization of an independent labor union. Mr. White agreed to serve and soon prepared a draft for those papers (R. 715, 766-767, 776).

(d) Further Consideration of Plans

During the ten days after the Petersburg meeting numerous meetings were held both in Richmond and in Norfolk for the purpose of hearing reports of the Petersburg meeting and the employment of counsel, and of considering the form of the draft constitution and by-laws when available. At least six of such meetings are shown by the record.* During the course of these meetings the draft constitution and by-laws were revised considerably (R. 715-716, 746-748) and a committee was appointed in Norfolk to meet with the Richmond representatives for changing and approving a form of constitution, it being considered that a committee could function more efficiently than any large group.

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* June 4th, Norfolk—Cove Street (R. 680-681); June 7th, Norfolk—General Office Building (Board Ex. 20, R. 841 [introduced at R. 112, 248]; R. 680-681, 698, 802, 806-807); June 9th, Richmond—(Intervener's Ex. 35, R. 932 [introduced at R. 746]; R. 746); June 9th, Norfolk—Y.M.C.A. (R. 112, 405-406, 802-803); June 11th, Norfolk—General Office Building (Intervener's Ex. 6, R. 889 [introduced at R. 595]; R. 680-681, 698, 707-709); and June 14th, Norfolk—Reeves Avenue (Intervener's Ex. 31, R. 927 [introduced at R. 723]; R. 723, 725).

(e) Creation of the Independent

On June 15th a joint meeting of the Norfolk and Richmond committees was held in the American Legion Hall in Richmond, attended also by representatives from Fredericksburg, Petersburg, Williamsburg, Roanoke Rapids and perhaps Suffolk, as well as by Mr. White. His draft papers were read paragraph by paragraph and revised. As a result of protracted discussion, lasting over four hours, the committees approved the constitution and by-laws in their revised form and at the same time approved a form of membership card as a means of soliciting adherence to the proposed organization.* The next day Mr. White had the first two papers mimeographed and the last printed (R. 747-750 and Intervener's Exhibits 36 and 37, R. 934 [introduced at R. 748, 749]). These papers designated the name of the new association as "The Independent Organization of Employees" or the Independent.

The resulting constitution and by-laws were reported by the respective representatives to numerous groups of the men, for consideration, revision and ratification or rejection. Seven of these meetings are indicated by the record.** All of these meetings were called and conducted by the em-

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* Minutes, Intervener's Exhibit 22, R. 915-920 [Introduced at R. 681]; Board Exhibit 26, R. 843 [introduced at R. 173]; Board Exhibit 36, R. 844-855 [introduced at R. 247]; R. 247, 681-683, 688-689, 694, 708, 746-747, 768, 783.

** June 15-20, Petersburg (R. 787-788); June 16th, Norfolk (Intervener's Ex. 7, R. 891 [introduced at R. 596, 598]; R. 595-598, 631-632, 681, 683, 698-699, 708-709, 806-807); June 18th, Richmond (R. 808-809); June 22nd, Norfolk (Intervener's Ex. 8, R. 891-892 [introduced at R. 598]; R. 598-600, 646-648, 682-683, 689, 693, 709, 710, 713, 804-805, 806-807); June 23rd, Richmond (Intervener's Ex. 38, R. 934-938 [introduced at R. 750]); June 28th, Norfolk (Intervener's Ex. 9, R. 892-893); and June 29th, Richmond (Intervener's Ex. 39, R. 938-942 [introduced at R. 750]; R. 750, 769, 808-809).

ployees themselves and not on company property. A majority in each meeting approved the papers.

Solicitation of membership in the Independent began among the employees as soon as the membership cards were available, about June 18th. Generally the employees did not solicit or sign membership cards on company property or during working hours, but in some instances solicitation occurred in violation of the rule.* On the other hand, AF of L and CIO organizers, and employees who were members of unions affiliated with those organizations, also discussed and solicited for those unions among the employees on company property and during working hours.**

(f) First Elections

Pursuant to the Constitution and by-laws of the Independent nomination of candidates for the division committees was made throughout the properties on July 2nd, and the election from such nominees was held throughout the properties on July 12th. The proceedings both at the time of nomination and at the time of election were conducted off company property, not during working hours and by elaborately secret ballots.***

As a result of these elections the official personnel of the Independent was for the first time created. Accordingly the provisional Steering Committees which had theretofore acted in Norfolk and in Richmond were dissolved and the new representatives proceeded to complete their inter-depart-

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* R. 155-156, 193-197, 205-206, 600-602, 629, 645-646, 683-684, 728, 737, 805.

** R. 156, 178-179, 669-670, 684, 699-700, 709-710, 730-733, 793-794.

*** Intervener's Ex. 39, R. 938 [introduced at R. 750]; Intervener's Ex. 41, R. 944 [introduced at R. 751]; R. 79-80, 602-607, 648-652, 684-685, 698-699, 805, 807, 808.

mental organization as contemplated by the Independent's constitution.*

It appears that the Independent had a large majority of the men in all departments of the Company at the time of this nomination and this election. Thus 1912 men voted in the nomination and 1885 in the election. Indeed the evidence is that a majority of the men had signed up for the Independent by about the 1st of July.**

(g) Formulation of Demands by the Independent

The newly elected representatives made an intensive canvass of their respective "voting sections" to ascertain the wishes of the men for demands to be made on the company in regard to wages and working conditions. These discussions were pressed with particular zeal because of a plan to hold a convention of representatives from the whole system at Ocean View, Virginia, on July 17th.***

This convention at Ocean View seems to have been very active and business-like. The representatives, having ascertained the wishes of their respective voting sections, met to compose their views into a common series of proposals. First the analogous divisions of Norfolk and of Richmond developed common proposals. These were then submitted to more general groups and so in turn to a single system meeting for all departments, which assembled the demands of the several groups and approved them in the form of one proposal. The meeting lasted two days. The final proposal was reduced to the form of a contract by Mr. White and

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* R. 651-652, 807-808 and Intervenor's Exhibits 10, R. 893 [introduced at R. 606] and 42, R. 948 [introduced at R. 751].

** R. 710, 725, 733-734, 778-779, 787-788.

*** Intervener's Ex's 15, R. 895 [introduced at R. 606], and 29, R. 926; R. 605-607, 613-614, 652-655, 691, 711-712, 786-787.

approved in that form by the General Committee.* On July 19th the proposed contract was sent to the Company under a transmittal letter prepared by Mr. White (Board's Exhibit 5, R. 823 [introduced at R. 46, 47]; R. 46). This letter stated that the Independent had a membership of 2416, or 89% of all non-supervisory employees, and asked for an interview to discuss the enclosed form of contract.

(h) Negotiation of Contract With the Independent

On July 21st Mr. Holtzclaw answered the Independent's letter by requesting a certificate as to membership and agreeing to meet on July 30th (Board's Exhibit 6, R. 824 [introduced at R. 46]; R. 46). On July 26th the General Committee accepted that date and supplied a certificate showing a membership of 2429 (Board's Exhibit 7 [introduced at R. 47] and 7A [introduced at R. 61, 248], R. 825; R. 46-47, 61). Before the time of the proposed meeting Mr. Holtzclaw asked T. Justin Moore, General Counsel of the company, to make such investigation as he might deem appropriate to ascertain whether the Independent was a properly constituted bargaining agency with authority to represent the members claimed by it (R. 438-439). Mr. Moore accordingly made an inquiry of Mr. White and received in reply a letter dated July 27th summarizing the formation, organization and membership of the Independent (Respondent's Exhibit 13, R. 872-874 [introduced at R. 261]).

When the meeting convened on the morning of July 30th the Independent representatives produced for examination 2543 signed membership cards (R. 655-656) representing about 90% of all supervisory employees (R. 442-443). On

* Minutes, Intervener's Exhibits 16A-F, R. 896-901 [introduced at R. 609, 669]; R. 608-612, 654, 711-712, 734, 751, 768-769, 787, 805.

Mr. Moore's advice that the Independent appeared to be a duly constituted bargaining agency with authority to bargain for all the employees, the management proceeded with the meeting (R. 293-295, 313-314, 438-439, 459-460, 655-656, 717, 751-752).

The negotiations soon developed important differences of view which were vigorously maintained. At the very outset the company stated that it was unalterably opposed to any closed shop provision (requested by the Independent) and that the wage demands were fantastic. Having discussed the closed shop clause all morning without any progress toward agreement, the conferees passed on to the other general provisions of the Independent's proposed agreement* and then separated into four sub-committees for the respective departments of the company's business, *i.e.*, transportation, electric, gas and accounting-sales-and-general-office. These negotiations are described in detail by the participants.** These departmental negotiations continued throughout that afternoon and evening and all the following day until about ten o'clock in the evening. By this time substantial agreement had been reached on all points except two major issues, the question of wages and the question of the closed shop clause. The latter was vigorously demanded by the Independent on the ground that anything achieved by its activities would benefit all employees alike

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* These included a clause requiring the company to accept an assignment from the Independent members authorizing deduction from wages for dues, to be paid to Independent less the cost of accounting. This was accepted by the company after modification to entitle every employee to revoke such assignment at any time. (See R. 49, 828.)

** Every step in the negotiations was covered by the testimony of the leading participants; Holtzclaw, R. 46-49, 446-447, 460-461; Smith, R. 259-266, 269, 291-306, 314; Jones, R. 324-326, 345-346; Throckmorton, R. 358-361, 368-370, 378-379, 384-385; Faust, R. 614-620, 655-659; Bertolett, R. 750-752; Underwood, R. 769; and Hough, R. 805; Respondent's Exhibit 14, R. 874 [introduced at R. 269].

and all should pay their share of the cost; the company however, was unwilling to agree that any man be compelled to join any organization. At this juncture the management representatives and Independent representatives separated in order to see whether some compromise suggestion might be found to meet the remaining issues. After protracted discussion, first separately and then jointly, agreement on both issues was made as follows: (1) the closed shop clause was to stand but be liberalized by providing that nothing in the agreement should "prevent or in any wise affect the right of any employee to join or remain a member of any other labor organization," and (2) wage increases should be granted on an intermediate figure. During all of the next day, August 1st, negotiations were again resumed, and continued until midnight, to formulate the text of the agreement. By that time an agreement had been drafted that was acceptable to both sides.

There can be no possibility of question from this evidence that these negotiations were aggressive, arm's length bargaining by each of the respective parties. The Independent representatives were shrewd and capable men, fully posted as to the facts surrounding the contentions they were making. The discussions were serious and energetic on each side, and at times acrimonious. Both parties yielded in various particulars in the process of arriving at a common result. The final contract differed in numerous provisions from the original proposal (R. 264-265, 300-301). The company was forced to concede far more than it desired or than it now desires. The cost of the wage increase amounted to approximately $600,000 a year (as compared with something over $1,000,000 a year under the original Independent proposals), and that was far in excess of anything that the company management had ever imagined might result from the negotiations, or had ever supposed might be agreed to by it (R. 265-266, 446-447, 460). That increase was solely the result

of the negotiations "and was not in the slightest degree the result of any predetermined idea of the company officials" (R. 446-447).* The closed shop proposal, even in its modified form, was also something that the company management never anticipated that it would agree to; and it does not like it now and wants to have it removed from the contract (R. 264-265, 296-297, 314, 446, 460-461, 619).

(i) Execution of Contract

Not only were all the members of the General Committee of the Independent present throughout the above negotiations, but also all of the division committees were present for a good part of the time and for all of the last day (R. 658-659). After the conclusion of the negotiations the respective division committees met that night in Richmond and formally accepted the contract that had been developed in the negotiations (R. 620-621, 658). In spite of the plenary power of the division committees, the form of contract was reported to the men for an expression of their views before its signature. It received their overwhelming approval.**

On August 5th the members of the Independent's General Committee again met with the management and the contract was signed.***

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* This statement is doubted by the Board (R. 968), but no contrary finding is made.

** Thus see Faust, R. 620-621, 658; Tatem, R. 717-718; Steele, R. 738; meeting of Norfolk inter-departmental committee on August 4, Intervener's Exhibit 30, R. 926-927 [introduced at R. 712[; and R. 712; and written assent of majority of Norfolk transportation men R. 442-443, 805-806.

*** The agreement as executed (Board Exhibit 9, R. 826-839 [introduced at R. 48, 53]; R. 52-53) included a recognition of the Independent as the bargaining representative for all employees and permitted the Independent to set up bulletin boards on company property (Section A); required membership after 90 days as a condition to further employment, but with full permission to join or remain a member of any other union (Section B1); provided for a check-off on individual, revocable assignments (Section B2); regulated discharges

(j) Subsequent History

Shortly after the execution of the contract on August 5th the Independent established grievance committees for its respective voting sections. They began work at once and have handled a large number of cases all over the system.*

On August 20th the company paid the Independent $3,784.50 as required by the check-off provision in the contract and the individual assignments by the men which had been delivered to it.** Obviously this sum had then been already earned: it represented the mid-year half of the annual dues (Board Ex's 26 [introduced at R. 173] and 36 [introduced at R. 247], R. 843 and 855) or $1.50 per man; the contract had been signed two weeks before (August 5th) and the assignment cards had been delivered as early as July 30th (R. 655-656). It is clear, therefore, that the various assignors had a claim against the company in excess of $1.50 per capita and no credit was given by the company. The question of the date when the actual deductions were mechanically made on the books was purely a matter of the company's own convenience. This payment accordingly involves no support for the union, as the Board would have it appear (Decision, R. 967, Brief, p 6); nor was it

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(Section B3); required time and a half for overtime (Section B6); provided for arbitration of grievances (Section B7); and established elaborate provisions for basic wages (at a material increase) and terms and conditions of service for all departments (Section C, D, E and F); the agreement to begin as of June 1, 1937, and continue for one year and thereafter from year to year subject to termination by either party upon notice before any annual period (Section G).

* R. 156-157, 561-562, 577-582, 621-624.

** Board Exhibits 9 (R. 828) [introduced at R. 48, 53], 26 (R. 843) [introduced at R. 173], 36 (R. 855) [introduced at R. 247], 53 (R. 860) [introduced at R. 779]; R. 779. The transmittal letter of August 20th (R. 860) declared that the Company was "arranging to have pay roll deductions made during the month of August from the pay checks of the employees involved." A check-off provision is, of course, lawful (*L. Greif & Bro., Inc.*, v. *N. L. R. B.*, 1939, CCA 4, 108 F. (2d) 551, 557).

an "anticipation" of the Independent dues, as the Board argues (Brief, p. 26), for they were then past due (Board Exhibit 36, R. 855 [introduced at R. 247]).

Notice of the provision of the contract requiring all existing employees to become members within 90 days after its date was given to all employees by posting a bulletin throughout the properties under date of October 28th (Board's Exhibit 41, R. 858 [introduced at R. 514]; R. 309-310). On November 4th the terms of that contract provision were again posted (Respondent's Exhibit 9, R. 861). By that time in fact all employees had become members of the Independent except two, Elliott and Staunton, whose employment came to an end at that time as explained below (R. 267-268).

Meetings of the departmental committees and of the respective voting sections of the Independent appear to have been held regularly throughout the entire period since the execution of the contract.*

Before the expiration of the first year of the contract (which continued in effect from year to year unless terminated by 30 days' notice before the end of any annual period), the management and the Independent met on April 29, 1938, to discuss renewal or modification. It appeared that each party desired extensive modifications. The most important of these by the Independent was a request for a new large wage increase and by the company a renewal of its original request for elimination of the closed shop clause. It was arranged to meet again on May 9, 1938, for further discussion, but on that very morning the complaint in this proceeding was served and both parties agreed to suspend negotiations. Thus the contract automatically came into effect for the next year.**

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* Intervener's Exhibits 19-A-P, R. 903-912 [introduced at R. 624]; R. 577-582, 623-624.

** R. 306-307, 310, 439-442, 628-629, 657-658.

(k) Authenticity of the Independent

The foregoing summary is believed to indicate all of the principal events in the history of the Independent. The uncolored words of that simple narrative show that the Independent was created by free and deliberate decision of an overwhelming majority of the men themselves. In the initial groping for some plan of organization the men met on company property, but not, so far as the record shows, with any permission from the supervisors except for initial gatherings when reports of the May 24th speech were made. Spontaneously and universally the desires of the men were strong for an unaffiliated union. Their desires were demonstrated by meetings and signed letters of authorization which leave no doubt as to the authenticity of that expression. Remarkably full and informative minutes were kept of most meetings and all such minutes are in the record.*

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* These contemporary records are an impressive chronicle and it may be to the convenience of the Court to have them indexed; references are to Intervener's Exhibits unless otherwise specified:

1. May 26; Norfolk; Cove Street garage (Ex. 3), R. 888 [Introduced at R. 589].
2. June 1; Norfolk; general office building (Ex. 4), R. 889 [Introduced at R. 592].
3. " 1; Richmond; general office building (Ex. 33), R. 928 [Introduced at R. 745].
4. " 3; Petersburg; office building (Board Ex. 19), R. 839 [Introduced at R. 111, 248].
5. " 7; Norfolk; general office building (Board Ex. 20), R. 841 [Introduced at R. 248].
6. " 9; Richmond; (place not shown) (Ex. 35), R. 932 [Introduced at R. 746].
7. " 11; Norfolk; general office building (Ex. 6), R. 889 [Introduced at R. 595].
8. " 14; Norfolk; Reeves Avenue (Ex. 31), R. 927 [Introtroduced at R. 723].
9. " 15; Richmond; American Legion Hall (Ex. 22), R. 915 [Introduced at R. 681].
10. " 16; Norfolk; Navy Y. M. C. A. (Ex. 7), R. 981 [Introduced at R. 596, 598].

(Continued on next page)

Proceeding in their own way the men established contact between Richmond and Norfolk and engaged a lawyer of their own choice who had no connection with the company. He prepared a form of constitution and by-laws which, after discussion and revison by the committees established by the men, was adopted by them on June 15th. From that moment on, the affairs of the organization have been conducted with the utmost formality and secrecy; no meetings were held on company property (R. 694, 808); no indication was ever given to the company of what was taking place. All of the Independent's members are strictly non-supervisory employees (R. 759-760). Indeed it is obvious that, mindful of the general conviction that unaffiliated unions are the subject of painstaking scrutiny by the Labor Board, the men were zealous to avoid anything that might even be made the object of any question by hostile interests. So far from having any knowledge or notion that the com-

11. " 22; Norfolk; Blair High School (Ex. 8), R. 891 [Introduced at R. 598].
12. " 23; Richmond; American Legion Hall (Ex. 38), R. 934 [Introduced at R. 750].
13. " 28; Norfolk; Navy Y. M. C. A. (Ex. 9), R. 892.
14. " 29; Richmond; IOE office (Ex. 39), R. 938 [Introduced at R. 750].
15. July 6; Richmond; IOE office (Ex's 40-41), R. 943-944 [Introduced at R. 751].
16. " 13; Norfolk; Monticello Arcade (Ex. 10), R. 893 [Introduced at R. 606].
17. " 16; Richmond; IOE office (Ex. 42), R. 948 [Introduced at R. 751].
18. " 16; Norfolk; parking lot (Ex. 15), R. 895 [Introduced at R. 606].
19. " 17-18; Ocean View; hotel (Ex. 16), R. 896-901 [Introduced at R. 609, 669].
20. " 26; Norfolk; Monticello Arcade, (Ex. 17), R. 901 [Introduced at R. 612].

Other authorizations are those of June 3 to Tatem (R. 706-707) and the written acceptance of the Independent contract by the Norfolk Transportation men (R. 442-443, 805-806). Organizers having anything to conceal do not record their actions in such detail.

pany would recognize the Independent in the negotiations of July 30th, the General Committee was discussing with its counsel on the night of July 29th what steps they would take, including proceedings before the Labor Board, in the event of a refusal to recognize (R. 657, 671). The conduct of the Independent in the establishment of its officers and committees, negotiations with the company and administration of its own business, is so patently uninfluenced by and independent of the company that no intelligent question of it can be made. It would be hard, indeed, to imagine a more independent and aggressive organization.

These conclusions which are inescapably obvious from the history itself were illustrated by specific testimony of Independent members who were most intimately and continuously familiar with its proceedings. In its whole history they knew of no favor, support, assistance, influence, interference or domination by the company, or any effort at any of those things, and every penny of its funds came solely from the contributions or dues of its members.*

6. Treatment of the Independent by the Board

The Independent received short shrift from the Board. Three pages sufficed to tell the story and to pronounce sentence. Such brevity was made possible by omitting any reference to the multiple manifestations of employee choice exhibited in the various meetings and authorizations summarized above. It was facilitated by a liberal use of inference irrespective of the evidence. But analyzed, the decision of the Board and the brief filed in its support rely, aside from matters dealt with in the later sections hereof, only on four main theories: (1) a claim that the May 24th meeting provided the "initial impetus for subsequent organization",

* R. 630-631, 658, 668-669, 671-673, 685-686, 714, 753, 758-760, 769, 784, 785, 807-808.

(2) an inference that because the Independent men were quick, therefore they were coerced, (3) an argument that certain uses of company property necessarily invalidate the organization and (4) a claim by the Board's counsel on brief that inclusion of terms for check-off and closed shop in the Independent agreement was aid by the company.

(a) The Claim of Initial Impetus

The May 24th meetings have been sufficiently discussed at pages 15-25 above. The addresses being non-partisan, it is not true that they supplied any "initial impetus (R. 964-967) except at most in the sense that one who tosses a coin provides the "initial impetus" for a decision. The statement of the current problem did no more than give the men an opportunity for action; it did not predetermine or influence the nature of the decision that might be made, whether to form any organization, or if so, what kind of organization to form. The statement in the Board's brief (p. 41) that by admission of the company "the Independent came into being as an immediate result of these company meetings and addresses of May 24" is untrue, both as a statement of the cited source (Board Decision, note 16, R. 965) and as a statement of the fact. The Board's note claimed only an admission that the May 24th speech gave "impetus to the formation of the" Independent. The only basis for that claim was a statement of counsel in oral argument, consistently with the above argument in this brief, that the May 24th address "did give impetus to something being done," but not to any particular form of organization.* Nor can it be said that the May 24th addresses embodied a choice by the employer as to the organizing moment. On the contrary

* Official Report of Proceedings before the Board in Washington, D. C., April 13, 1939, at pp. 66-A-66-B.

the employer was at that very moment a victim of an unexpected and unmanageable situation creating an apparent necessity for negotiation in the absence of any practical vehicle for negotiation. All that the May 24th addresses did was to state this current problem to the men and state the willingness of the company to abide by whatever their choice might be.

But if it should, contrary to the fact, be considered that the May 24th addresses did indicate a company preference as between organizational forms, nevertheless they unequivocally declared the complete liberty of choice of the men. That being so, they do not constitute an unfair labor practice (pp. 26-36 above), which alone the Board is empowered to remedy.

In either event, therefore, the claim that the May 24th addresses supplied an initial impetus fails to make out an unfair labor practice within the meaning of the Act and thus provides no support for the Board's order.

(b) The Calendar

The calendar is then made to say (R. 967-8) that since the time within which the men acted was relatively short, their choice could not be authentic, but if that be true, then the more vehement the feeling the less effect it will be allowed; a complete conviction will be wholly disregarded. Doubtless there are circumstances in which speed of action may suggest lack of thought or lack of choice but no such inference is permitted by the concrete circumstances of the meetings that have been briefly summarized above. Their very artlessness and the diversity of means by which choice was ascertained are proof of their authenticity. No demonstration of general view could have been more spontaneous or more irresistible. In such circumstances, if sentiment was obvious at once in all departments except one, and obvious in that

one by the end of three weeks, that should confirm the veracity of the choice rather than disparage it.*

The Board also implies that recognition and agreement by the company were speedy. But the preceding discussion has shown the elaborate documentary evidence on which the company consented to negotiate with the Independent and the earnest negotiations in which the agreement was developed. There is no basis for any charge of speed. When the Independent had, as it did, a majority of all the employees in its membership, there was no reason or justification for delay (*N. L. R. B.* v. *Arma Corporation*, 1941, CCA 2, 122 F. (2d) 153, 156). Even, however, if the company had "made haste," this would not have been in itself "a sufficient factual basis for the finding of interference, domination and support" for such evidence "is not inconsistent with the contrary hypothesis, and therefore supports neither" (*Cupples Co. Manufacturers* v. *N. L. R. B.*, 1939 CCA 8, 106 F. (2d) 100, 114).

(c) Company Property

Unquestionably the men were meeting on company property for their discussions in the early preliminary stages before any definite organization was formed. But there are certain important limitations on that statement which are not mentioned by the Board.

In the first place, there is no evidence that any one in supervisory position gave any permission for any meeting whatever on company property, or otherwise "cooperated"

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* Thus the court below had previously declared (*N.L.R.B.* v. *A. S. Abell Co.*, 1938, 97 F. (2d) 951, 957):

> "There is, however, no justification for the position that spontaneous action on the part of the men is so improbable as to warrant the inference that it was inspired by the management."

See also *A. E. Staley Mfg. Co.* v. *N. L. R. B.*, 1941, CCA 7, 117 F (2d) 868, 875.

(Board's Brief, pp. 5, 9, 23, 27, 34, 35 and 36) in respect of any such meeting, except only for two meetings. Those two meetings were called by two delegates to the May 24th meetings for the purpose of making a report to their men on what had been said at the May 24th meetings and of soliciting their views. This limitation is not mentioned by the Board. Indeed the very opposite is implied or stated (e.g., Brief pp. 27, 34, 35 and 36). Similarly the Board does not mention that there is no evidence of any employees leaving their work for any meeting except in the case of only one of the two above meetings.*

Even in these two instances of consent to meetings on company property, there are important qualifying circumstances. In the one case, the supervisor was not told the purpose of the meeting (R. 727-8) and it was held in an auditorium in the Norfolk generating station which is in part maintained by dues from the men and used by them for social purposes (R. 719-20, 722). In the other case, a meeting called by Holzbach among the Richmond distribution employees, permission was first refused and then granted only for the following reason:

> "I was first turned down, and when I told them that I only wanted the hall to explain the Wagner Act to those who had not been present at Mr. Holtzclaw's meeting, the auditorium was granted me" (R. 791).
>
> "The argument he used was that he was primarily elected as a delegate to find out something and he was

* In that case the men did not actually leave their work but were allowed to start late (R. 797-8). All references cited in this connection by the Board (Brief, text of p. 23) are to that one meeting or to a reading of the May 24th address to certain employees who had accidentally not been notified of the May 24th meeting (R. 761). Superintendent Crafton ended the work day for his men "on time" (R. 676 and page 40 above), not ahead of time as Board's Counsel argue (Brief, Note 11, p. 23).

> coming back to report and he felt it his responsibility to render a report under the circumstances" (R. 742).

The supervisor's reply to Holzbach is of particular interest, and it should be remembered that the reply was made at a time when the organizational views of the men were not known; Holzbach testified (R. 798):

> "I was told that we could use it [the company auditorium] up until we began to organize. Mr. Walke said 'The Government does not let us assist you in any way, shape, form or fashion. I do not mind you using the auditorium, but when you start organizing you will have to stop it.'"

All use of company property for any other meetings was unauthorized. This fact is disregarded by the Board, on the assertion that numerous newspaper articles advised the company that such meetings were being held (Decision, R. 968). The Board, however, does not say that newspaper articles advised the company *where* the meetings were being held. Doubtless this was deliberate on the part of the Board, because no newspaper made any statement that any meeting was held on any company property in Richmond, and aside from meetings on two days in the Transportation Department Y. M. C. A.,* only one meeting on company property was mentioned in Norfolk** (Respondent's Ex. 11, R. 862-

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* As already indicated, these quarters were in part maintained by dues from the men and were used for general recreational purposes (R. 327-8). The meetings, moreover, were concerned with a proposed organization of Elliott's, and not with the Independent.

** This was the meeting of June 1st, which dealt almost entirely with Elliott's proposal for an EAC, which was proposed by him in competition with the Independent; all the discussion was of a very preliminary character and no conclusion was reached (page 43 above). If the Board's brief (Note 25, p. 36) means that there were newspaper references to the place of any other meetings (on company property), it is not correct (Respondent's Exhibit 11, R. 862 [introduced at R. 247]).

871 [introduced at R. 247]). Thus there is no basis for the Board's assertion of general acquiescence by management.

If there had been a design on the part of the company as the Board asserts, to stimulate a union of *its* own choosing, it can hardly be supposed that the company would have chosen to defeat its own end by permitting the use of company property. Mr. Holtzclaw had already announced in the May 24th address that the Act prohibits a company from interfering with the formation of any labor organization or contributing support to it. The Board's special suspicion of company property use is well known. So if he was conniving at the birth of a dominated union, he would hardly choose it to be still-born. The Board does not mention this inconsistency of its assumptions.

Moreover, such use of company property was made only in the first tentative groping for a plan before any effective decision was made. Management could not have known what the outcome of these preliminary discussions would be, so even if it had been conscious of the property use and could thus be said to have permitted it, such permission would have been without meaning. From the point of view of the men, the very act of meeting on company property to consider formation of an unaffiliated union proves that their action was not according to any fixed, prior design. The Board does not refer to these considerations. One of Mr. White's first acts after his retainer on June 5th was to advise the men not to meet on company property; "I told them the matter [the Board's doctrine] had been carried to what they might regard a ridiculous extent, but it was a fact, and so I advised them accordingly;"* such use was discontinued in Richmond at once and in Norfolk from and after June 15th, when Mr. White first had direct contact with them. *There has never been any meeting on company property*

* Official Transcript of Argument before the Board, pp. 31-33.

since that time. This was indeed stipulated by counsel for the Board (R. 807-808). These facts are not mentioned by the Board.

In the zeal of an organizational campaign among 3000 employees it is inevitable that some of the men will be solicited on company property in working time. Prohibitions against such action can not be absolutely enforced. Of course there were instances of this in the Independent campaign, notwithstanding the position of management that no organizational activity of any nature should be permitted on company property or company time* and the similar position of the leading men in the Independent movement.** But such action could have no significance on the question of an unfair labor practice unless it were so loud and general as to proclaim support by management. There could be no such argument on this record. On the contrary, management instructions were clear and uncontroverted, the violations were of merely incidental nature and were committed by the complaining unions*** as well as by the Independent. Since there was substantial solicitation on company time and property for the complaining unions, the Board is not entitled to balance (as it attempts in its brief, note 26, pp. 36-37) the amount of such solicitation against the amount of Independent solicitation and to disregard the

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* This was one of the instructions to all supervisory personnel on May 25th (R. 289-290, 319-320). No violation of these instructions was ever brought to the attention of management until the complaints by the Board.

** This was one of the instructions by Tatem at the June 16th meeting in Norfolk (R. 596-598, 645-646). This rule was generally understood among the men (R. 728); and generally followed (R. 600-602, 683-684, 737).

*** R. 155-156, 178-179, 669-671, 684, 709-710, 730-732, 793-794. The Board cites similar management instructions to two earlier outside organizers (Decision, Note 17, R. 965), but tells only half the truth: the full management reply to the organizers was that they were perfectly free to do as they wished but not to solicit on company property or time (R. 350-351, 370-372, 428-429, 448).

former on the ground that the latter was quantitatively greater. It is not clear indeed that it was greater, but if so that was only because there was more interest in the Independent. There is no claim that any solicitor for the complaining unions was stopped from use of company time or property in any case during the whole organizational period.*

The Board's comment on the use of telephones is equally misleading. The company has a private telephone line between Richmond and Norfolk for company use. It is very frequently used by switchboard operators in the course of their duties and by employees in the system operator's office. There is also a carrier current circuit for telephoning over the transmission lines. The evidence indicates that these lines are frequently availed of by the employees, contrary to rule, for personal communications, without permission.** In the early days before the definite organization of the Independent the men used these lines occasionally in regard to organizational matters. But there is no claim that this was with the knowledge or acquiescence of management. So it is misleading for the Board to argue (Brief, p. 27) that such facilities were used "freely;" it would have been more accurate to say "clandestinely."

The final comment of the Board in this connection is of a similar nature. "The bulletin boards of the respondent" were used "freely," the Board says, by the steering committees during the preliminary stages (Decision, note 17, R. 965). This however, is a plain inadvertence. In the whole

* The Board's claim (Brief, note 26, p. 37) that one Independent solicitor "openly conducted his drive on company time and property for over a month with no reprimand" is a distortion of the record. That witness (Reutt) was not a person of any prominence in the Independent; it was not shown how many men he solicited or signed; he testified that he was not interested in the undertaking; and he had no recollection of ever handing out any membership application cards when any foreman or supervisors were present (R. 76-77).

** R. 719-721, 725-726, 765-766, 780.

record there is no suggestion of any such use except *before* the formation of any "steering committee," and then only by one individual who had no authority of any kind: Holzbach, a representative at the Richmond May 24th meeting, who acted as temporary chairman after executives left, felt entitled to report the substance of Mr. Holtzclaw's speech, and thus on his own responsibility obtained permission to post a bulletin for a report meeting on May 26th (R. 756, 795-796).* The Board's comment is thus a misstatement of the record.

There is no basis in the record for any finding as to use of company property or facilities except in a casual, incidental and unauthorized manner at a time prior to the decision on the course to be followed. If the Decision purports to find greater use, there is no basis for such finding. If the Decision means that even such use is under the Act an incurable, permanent infection, it perverts the practical objectives of the Act into unjustifiable artificialities.

(d) Closed Shop and Check-Off

To these three thin circumstantial suspicions on which the Board relies, its counsel now add on brief a claim that the provisions of the ultimate agreement for a check-off and closed shop are "significant factors evidencing the company's desire to aid the Independent" (Brief, p. 38; not relied on by the Board in its Decision). In support it is asserted that the Board has often held the grant of such privileges "in circumstances such as these" to constitute prohibited interference and support (Brief, p. 39). Since the

* Surely the Board does not have in mind the notice posted by Reutt (R. 64-65) of a meeting on May 11th to hear Elliott read the Act (R. 94-95, 139-141, 153-154, 161), for that had nothing whatever to do with the Independent, but, as the court below held, was "another organization . . . and impeded rather than helped the organization of the" Independent (R. 1015).

Board is the author of the cited rule, the tacit refusal of the Board to apply it in the present case is not to be overlooked. Beyond that, the argument is equivocal. It would certainly not be made if the recognized union had national affiliations, for such contract terms are commonly sought. And if the Independent had not succeeded in achieving these two desired contract terms, Board counsel would doubtless have argued that its failure to do so was symptomatic of the powerlessness natural to its position as a creature of the company's will. The Board's decision can not be much fortified, therefore, by a claim of Board's counsel, not made by the Board itself, that the success of the Independent in negotiating a closed shop clause that was opposed and is still opposed by the company demonstrates incapacity to act for the men.

(e) Conclusion

The Board does not discuss or give any weight to the multiple manifestations of spontaneous choice on the part of the employees that have been summarized hereinabove. Nor does it even mention the form of the organization of the Independent, as particularly illustrated by the text of its constitution, which are manifest demonstrations of effective independence. Nor does it consider the detailed evidence as to the negotiations of the contract. Nor does it mention the fact that the administration of the Independent since negotiation of the contract has been so patently independent that no effort at proof or claim to the contrary has been made. The Board thus disregards uncontradicted and unimpeached testimony in order to substitute sheer supposition.

So the court below was right in holding that

> ". . . there is nothing to show that the employees' association does not represent the free choice of the employees, that the company at any time dominated or

in any way interfered with the employees in setting it up or that the company exercised over it any control or domination whatsoever." (R. 1008)

The Board's order of disestablishment was therefore properly set aside.

7. Other Claims of Interference

The claim of interference with organizational liberty in violation of Section 8(1) is, it would seem, only incidental to the main issue of the case, the question of domination of the Independent in violation of Section 8(2). The only two episodes distinctly asserted as violations of Section 8(1) (aside from the discharges dealt with below) are the 1936 questioning by Bishop (dealt with on p. 8 above) and certain conduct by a supervisor Edwards, which is unrelated to the main narrative and is dealt with here.

Edwards was one of 10 "supervisors" in the Norfolk transportation department (R. 385-386), no complaint being made against any of the others. First the Board says that Edwards stood across the street from a CIO meeting place; perhaps he did,* once when he was calling on the doctor of his fraternal lodge and once when he was waiting for his street car, but in neither case did he ever make any report concerning the matter to any one (R. 411-412, 418-421, 423-425). There is no indication that this action had any effect upon the men: Adkins, one of the witnesses asserting such "surveillance," joined the CIO in May, 1937 and joined the Amalgamated in December, 1937 (R. 235); in the early part of 1938 he was elected President of the Amalgamated; he still occupies that position and is still employed

* But even if so, this would not in itself violate Section 7 (*N. L. R. B.* v. *National Motor Bearing Co.*, 1939, CCA 9, 105 F. (2d) 652, 657); actual attendance at a meeting does not necessarily violate Section 7 (*N. L. R. B.* v. *Swank Products*, 1939, CCA 3, 108 F. (2d) 872, 875-6).

by the Company (R. 236). The next complaint is that Edwards warned Smith that he might lose his job by staying with the CIO. But this did not disturb Smith; he joined the CIO in May and became its Recording Secretary (R. 164-165); he remained such until it disintegrated in August and September, 1937, from lack of interest among the men (R. 245-247). After that Smith joined the Amalgamated and became its Financial Secretary (R. 151, 164-165). Smith had seen the April 26th bulletin before his conversation with Edwards; he saw the June 24th bulletin after his conversation with Edwards (R. 167); and his conversation with Edwards did not deter him from joining a union as freely as he chose (R. 165). Smith is still employed by the Company. Hopkins testified of a similar warning but showed a similar experience; he joined the CIO in May, 1937, was so active in getting new members that his position was generally known and is still a member (R. 149); in March, 1938, he joined the Amalgamated (R. 151); and he is still employed by the Company (R. 150).*

It is perfectly clear that these are a mere collection of complaints in an effort to pin something on the company and that they had no actual influence on the conduct of the men. That can not be the kind of practical situation for which the Act was intended to provide a remedy.

It is well, too, to view these collateral incidents with some sense of proportion for the whole case that is involved. The Court will recall that the company's properties extend over a considerable territory in tidewater Virginia and northeastern North Carolina, and that it has approximately 3400 employees, of whom some 400 are in a supervisory position. Despite archeological exploration of the Independent's files

* At the most this evidence is quite different from the claim made in the government's brief that Edwards "kept 'outside' union meetings under surveillance" (Brief, pp. 5, 10, 28, 35-6), which seems to indicate a settled course of continuous conduct.

in 1937-38 and four weeks of inquisition at a public hearing, no claim of intimidatory conduct is made in any community except Norfolk, and even there the attack really centers on only two men, Mr. Bishop and Mr. Edwards, and against them only in respect of an early period, probably only in May.* Even if the testimony of Board witnesses should be accepted at its full face value (to which it is clearly not entitled), the result would still be a clear demonstration that, as a practical matter and as things are handled in large groups of men, the company's policy of detached neutrality was conscientiously and with remarkable approach to unanimity followed by its supervisory representatives and must, therefore, have been manifest to the men.

There is no occasion, however, for any inferences of fact by the administrative tribunal or debate of *respondeat superior* by its counsel, for the company's policy was conspicuously published by executive announcements overriding any possible different inferences from the conduct of minor supervisors. Prior to the incidents in question, the April 26th bulletin had proclaimed "the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company"; about the time of those incidents the May 24th addresses made it "perfectly clear . . . that no employee will be discriminated against because of any labor affiliation he desires to make." And after these incidents the June 24th bulletin reannounced

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* Mr. Bishop testified that he never even conversed with any of his men on organizational subjects after May 25th (R. 406-407, 410). Mr. Bishop was quite clear that the management instructions of May 20th and May 25th were "not to interfere with the men in any way, shape or form" and that he promptly transmitted these instructions to his supervisors and that these instructions were obeyed (R. 388-389, 397, 411-412). It is uncontradicted that no complaint of any violation of these instructions was ever made to the management until made by representatives of the Board long after the event in issue (R. 258, 342-343, 456). If one had been made of Mr. Bishop, and had been found to be true, Mr. Bishop would have been reprimanded or, on repetition, discharged (R. 288-289).

the absolute "right to self organization, to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing." One of these messages was orally delivered by the President or a Vice President; each of the others was published in writing over the President's signature on every bulletin board throughout the properties.

In the face of these executive statements it is impossible that the alleged conduct of these minor supervisors, even if occurring as alleged, could have been accepted by the men as exhibiting the company's position; in that particular setting, such conduct was not "reasonably likely to have restrained the employees' choice" and the company may not "fairly be said to have been responsible" for any such conduct, so it does not afford "a proper basis for the conclusion that the employer did interfere" (*N. L. R. B.* v. *Link-Belt Co.*, 1941, 311 U. S. 584, 599).

The Board's order in respect of domination (Section 8(2)) and intimidation (Section 8(1)) was thus pro[illegible] set aside.

B.
THE ISSUE OF DISCRIMINATORY DISCHARGES

The Board finds that four men were discharged because of their participation in organizational activities. This number, as compared with a total of about 3400 employees (R. 458), hardly suggests a campaign to suppress civil liberties. The men are considered individually below.

1. Transportation Department

The two men that the Board finds to have been discriminatorily discharged are Mann and Elliott.

(a) MANN

Mann was discharged because of his offense against essential discipline. The Board makes such an urbane and decorous understatement of this offense as to eliminate its real meaning. The facts were that Mr. Bishop, superintendent of the Norfolk transportation department, was sitting in the dispatcher's office. The dispatcher was at his desk and some 10 or 15 men were standing around. Mann came in and said in a loud and angry tone, "Anybody seen this guy Bishop around here"? The dispatcher said "Mr. Bishop is sitting right over there." Mr. Bishop heard all this and looked up from his paper at Mann. Mann saw Mr. Bishop but turned and left without any word of regret or apology (R. 392-394, 407-410, 442-447). The same account of the incident was given by the dispatcher and by three of the employees present (R. 811-814). Mann himself admitted that the tone of a remark and the situation in which it is made and the number of people present give character to an incident and that it would be most unusual for any employee to come to Mr. Bishop in the presence of a number of other employees and refer to him loudly as "that guy Bishop" (R. 145-146). The Board, however, suavely omits these coloring circumstances from its recital. But they were not unperceived by the men who were standing around; they heard what went on and looked at Mr. Bishop with a smile; the next day he knew of a good deal of talk among the employees about the event. He testified that "in all my experience in handling men I had never heard my name mentioned that way by the men, or outside either, so far as that is concerned" (R. 392-394).*

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* The question whether Mann intended any "affront" to Mr. Bishop, as the Board inquires (Decision, R. 920; Brief p. 50) is irrelevant. Whatever his advance intention, he was in fact highly disrespectful in a public way, and upon knowing this refused any word of explanation or apology then or later.

Mr. Bishop testified that he was not in the least influenced by any union affiliations that Mann might have had and indeed had no knowledge of any such affiliations (R. 392-394). On the contrary, Mr. Bishop reported the event as a sheer instance of impertinence to Mr. Throckmorton, Norfolk Vice President, adding that Mann's record was not such as to make him overlook the offense (but indeed was very poor because of many accidents),* and Mr. Throckmorton initiated the decision for the discharge; the question of union activities was not discussed in their conversation and Mr. Throckmorton had no idea of what union activities, if any, Mann may have been engaged in.** Mr. Bishop therefore discharged Mann, telling him at the time that it was because of his impertinence*** which he had not apologized for (R. 394, 407-408).

The Board disregards this impregnable evidence because Mr. Bishop offered no explanation why his son was present at a meeting in the company Y. M. C. A. barber-shop when Mann advocated the CIO (although Mr. Bishop said that he had never had any information from his son on this matter) and because of Mr. Bishop's "admission" that he "questioned" 15 men in 1936 (an admission which, as already shown, the record does not contain****). But this ap-

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* In the 10 months of his employment Mann had 25 different accidents (Respondent's Exhibit 46, R. 888 [introduced at R. 571]), costing a total of $430.00. Aside from the money involved this was an extraordinarily bad record and indicated that Mann was accident prone (R. 571-572). The Board disregards this evidence on the ground that Mann was not warned when the accidents occurred. The uncontradicted evidence, however, shows that he was warned 3 times, the last time only 3 weeks before his discharge (Respondent's Exhibit 46, R. 888 [introduced at R. 571]).

** R. 361-364, 380-381.

*** So shown by the personnel record (Respondent's Exhibit 46, R. 888 [introduced at R. 571]) and admitted by Mann (R. 143-144). Mann's action was on May 27; he was discharged on June 1.

**** See page 8.

proach, by which the Board finds discrimination by attacking the credibility of Mr. Bishop (both in its Decision, R. 970, and in its Brief, pp. 50-52) is not only arbitrary on the facts but beside the point. The uncontradicted testimony both of Mr. Bishop (R. 409) and of Mr. Throckmorton (R. 361-2), the company's vice president in charge of operations in Norfolk, shows that it was Mr. Throckmorton, on a report from Mr. Bishop, who made the decision for the discharge. Thus the record shows (R. 361-2):

> "A. Mr. Bishop told me that he was rather bothered about one of the operators, and I asked him, 'What is the matter?' He related his case to me. I said, 'Well, what is his record?' He said, 'He has a very poor record.' I said, 'Well, why don't you let him out?' And he was let out.
>
> "Q. What did Mr. Bishop say he was bothered about?
>
> "A. He was very disrespectful. He recited the instance to me, that Mann had come into the dispatcher's office. He was sitting back with the dispatchers, and in a very—I do not what kind of tone—but he said, 'Anybody seen this guy Bishop around here?' And Bishop says the dispatcher turned to him and said, 'Ask Mr. Bishop. He is sitting over here.' And Mann walked out.
>
> "To me it was just a pure case of an unruly employee, and I told Bishop to fire him.
>
> "Q. Was anything said whatever between you and Mr. Bishop on the point as to whether or not Mr. Mann had ever engaged in any union activity?
>
> "A. Not a thing.
>
> "Q. Did you have any idea as to whether he had any union affiliation?
>
> "A. I did not recall who the operator was until a letter came in from Mr. Schauffler making the complaint. I think the letter was dated July 22nd, that the operator Mann had been discharged, and asking that an investigation be made, and I had to call Bishop to find

out why he was discharged, and he told me, 'He is the man you told me to fire'."

Even if it were permissible for the Board to utilize sheer suspicion in lieu of evidence, it should observe the fact that according to the testimony of Board witness Hopkins there remained at the time of the hearing about 140 members of CIO,* no others of whom were discharged; the fact that the Vice-President and the Financial Secretary of the CIO are still employed by the company** (R. 151); and the fact that there remain in the employ of the company about 75 members of the successor union, the Amalgamated, including all of its disclosed officers (R. 152, 160-161, 164-165, 232, 236).

The Board's exaggeration of the real proportions of the event is greatly increased by its counsel; they give a new role to the discharge. From a relatively inconspicuous event in the Board's Decision, it grows into a general proclamation by the company that union membership invites dicharge, a proclamation cunningly "timed" to have its maximum impress on organizational choice and commanding universal attention (Board's Brief pp. 5-6, 9-10, 28, 35, and 50-52). The new importance acquired by Mann since the date of the Board's Decision is doubtless due to the opinion in *National Labor Relations Board* v. *Link-Belt Co.*, 1941, 311 U. S. 584, and he is promoted for the strategic purpose of affording some semblance of similarity to the facts in that case.

But Mann was not shown or suggested to have had any position of importance or leadership among his fellows; on the contrary, he had been employed only for a short time (R. 139) and his only recommendation (to organize an affiliated union) was not followed by his fellows (R. 140-

* R. 151. This seems extreme; cf. R. 245-247.

** The President, Elliott, was discharged on other grounds, as explained on page 79 below.

141). Many other more important leaders for affiliated organization could have been selected, including all persons who later became officers in the CIO or the Amalgamated. At most, therefore, this could have been only a bungling effort to terrorize, but understandable because by uncontradicted evidence the discharging officers were wholly ignorant of what Mann's organizational preferences were, what course, if any, the men were pursuing, and whether that course was toward a national union or otherwise.*

The argument of discreet "timing" of the discharge (e.g., Board's Brief, Note 24, p. 35) has still less support. The interval between the events on May 27th and the discharge on June 1st was no greater or less than a natural opportunity to confer with Mr. Throckmorton, post a notice for Mann to report and receive a call from Mann. So far as concerns the organizational effort at that time, not only the uncontradicted evidence (see pages 40-46 above), but also the Board's Decision (R. 965) and Brief (p. 23) show that meetings of employees to determine organizational preferences had been held before that date in all departments of the company and that all of those meetings had already expressed a strong preference for unaffiliated organization. There was no possibility, therefore, even from the Machiavellian point of view imputed by the Board, of any benefit from witch burning after the event; the only possible consequence of such an act would be subversive of the imputed purpose.

The court below thus properly held that Mann's discharge is "shown to have been due to insubordination" and that

> "any conclusion that . . . union affiliation . . . had any connection with his discharge is pure speculation, unsupported by anything in the evidence" (R. 1017).

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* R. 45-46, 49, 54, 59, 257, 258-259, 290, 436.

That summary aptly epitomizes the case and the Board's order of reinstatement was therefore properly set aside.

(b) Elliott

Elliott's employment was terminated because he did not join the Independent before November 3d, the final date within which the Independent contract required membership as a condition of further employment*. There was no inadvertence about this. Elliott knew of the contract requirement, in plenty of time to act, and his refusal to join was purely voluntary (R. 181, 183). There is no pretense by the Board that there was any other reason for his discharge.** But since the Independent was a lawful bargaining representative, the closed shop provision of the Independent contract was legal and valid under Section 8 (3) and the discharge pursuant thereto is non-discriminatory (*N. L. R. B* v. *Lion Shoe Co.*, 1938, CCA 1, 97 F. (2d) 448, 457).

But Elliott had already lost his job by the evening of November 1st whether or not he saw fit to create a further reason for that result. Six months earlier Elliott had had

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* Clause 1 of Section B of the IOE agreement (Board's Exhibit 9, R. 826 [introduced at R. 48, 53]) provides in part as follows:

> ". . . the Employer hereby agrees not to retain in its employment for a period of more than ninety days after the date of this agreement any employee eligible for membership in the Employee Organization, unless such employee is a member of the Employee Organization." (R. 827-828)

A bulletin dated October 28, 1937, quoted these terms and advised that the 90 day period expired at midnight on November 3, 1937 (Board Exhibit 41, R. 858 [introduced at R. 514]); this notice was repeated by a further bulletin on November 4, 1937 (Respondent's Exhibit 9, R. 861). Elliott was discharged for failure to comply with that requirement (Respondent's Exhibit 20-B, R. 878 [introduced at R. 363]).

** But in fact there is an affirmative finding that there was no other reason (Decision; R. 972).

a bizarre and unusual accident on cash day, whereby over $100. of company money disappeared, and he remained away from work for two months although in bed (if at all) only for a week. On November 1st, two days before the effective date of the closed shop clause and likewise a cash day, Elliott had a still more fantastic accident,** producing no objective symptoms*** except the loss of $75. of company money. Elliott never came back to work after that. The manager of the Norfolk transportation department testified that Elliott's report of the November accident was a clear deception and that Elliott would have been discharged because of it if he had come back to work (R. 417-418). This evidence is wholly disregarded by the Board on the sole ground that Elliott was not disciplined for the April "accident"; the Board evidently considers that a prescriptive right had been obtained.

It is no longer necessary, however, to rely on the professional opinion of a physician and the expert opinion of the supervisor that Elliott's story of the November 1st accident was wholly untrue. The Industrial Commission of Virginia, whose decision, as that of an adjudicating body, may be noticed by the Court, has now held that "the accident did not occur."**** It follows that the $75. which he said was lost in the "accident" was in fact stolen by him. This was adequate to terminate the employee relation and thereby bar any order of reinstatement (*N. L. R. B.* v. *Federal Bearings*

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* R. 128-129, 394-395, 416-417.

** R. 413-416, and Respondent's Exhibits 27, R. 881 [introduced at R. 414] and 28, R. 882 [introduced at R. 414].

*** So stated in the contemporary medical report (Respondent's Exhibit 35, R. 883).

**** Decision (reprinted in the Appendix hereto) dated December 22, 1938 (Claim No. 427557, Robert E. Elliott, Claimant, v. Virginia Electric and Power Company, Employer). The claim was for compensation for time lost because of the accident. Elliott testified in person before the Commission in support of his claim.

Co., 1940, CCA 2, 109 F. (2d) 945; *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 1939, 306 U. S. 240, 253-258).*

2. Electric Department

The two men that the Board finds to have been discriminatorily discharged are Staunton and Harrell.

(a) Staunton

There is no claim by Staunton (R. 172-173, 180) or even by the Board (Decision, R. 970-971) that Staunton was discharged for any reason except his failure to join the Independent before the expiration of the 90 days provided for in the Independent agreement. At the most, therefore, this was not a discriminatory discharge but, for the same reasons already mentioned in the case of Elliott, a lawful and valid discharge under Section 8 (3). The Board's order of reinstatement must therefore be set aside.

In fact, however, the record shows that Staunton was not discharged at all, for any reason, but voluntarily chose to leave. He saw the October 28th bulletin (Respondent's Exhibit 9, R. 861), quoting the closed shop clause and specifying the final date of November 3d (R. 176-177). One of the leaders of the Independent asked Staunton to join and even the IBEW officers (of which he was a member) asked him to do so (R. 175-176). His own testimony was that he had a perfectly free choice to join and work or not to join and stop work and he voluntarily chose the latter.**

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* As the Court said in that case (p. 258):

> ". . . to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."

** R. 176-177, 535-537, 552-553; Respondent's Exhibit 25-G, R. 880 [introduced at R. 367].

The Board, on its theory that the Independent was employer dominated, lays all this aside on the view that requirement of Independent membership was an illegal condition to continued employment and thereby in effect a discriminatory discharge (Decision, R. 970-971). We should remember, however, the realities of Staunton's choice. The closed shop clause did not prevent Staunton from continuing his membership in IBEW or from joining any other unions that he might desire.* Thus the requirement involved only the payment of dues, amounting to $3.00 a year (Board Exhibit 26, R. 843 [introduced at R. 173]). Even if this condition was "illegal," nevertheless it was not substantial.

Nor was it the real motive for Staunton's departure. Immediately after leaving the company he refused a job on transmission line construction in Norfolk at wages 50% higher than he was making with the company because he "wanted to leave Norfolk" (R. 177-178). He was not a Norfolk man and he was planning to marry a Norfolk matron as soon as she should procure a Reno divorce (R. 539-542). So there was no discharge in the sense of action taken against the will of the employee, but his departure was a matter of his own choice.

(b) Harrell

The evidence as a whole does not permit "conflicting inferences," as the Board's brief urges (p. 58). On the contrary, if anything can possibly be made clear by a protracted hearing it is that Harrell was, and progressively more and more became, an unsatisfactory employee. If the company is to continue its efforts for efficient operation, it must have

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* "Nothing contained in this agreement shall prevent or in any wise affect the right of any employee to join or remain a member of any other labor organization" (Board Exhibit 9, R. 826 [introduced at R. 48, 53]; and see R. 176-177).

the power to select unsatisfactory employees to be laid off when a reduction in force becomes necessary.

The context of this discharge is minimized by the Board. First, as to the general policy, an extraordinary volume of new rural construction had just come to an end*, and a general reduction in force was necessary. For the whole electric department, there was a reduction in force of 85 men between November, 1937, and April, 1938; of these between 50 and 60 were laid off on March 31st (R. 461-462); of these 13 were in Norfolk; of these only 2 were members of the IBEW (R. 473-474); both of these were complained about; as to one of them the complaint was dismissed. Harrell, therefore, is the only one of the 85 who is now said to have been laid off because of union activities**. There remained between 35 and 40 (R. 171-172) members of his union, the IBEW. These include Creekmore, the president of the IBEW, Morris*** its vice president, and White, its recording secretary (R. 244-245); Judge, its financial secretary (R. 187, 244-245) was promoted by the company (R. 191-192) and then laid off among the 13 for reasons, as the Board has found (Decision, R. 975), unrelated to his union activities.

It is fantastic, therefore, to assert that Harrell was singled out for punishment. Indeed it is fantastic to say that any one would be selected for lay-off because of union activities in the circumstances then existing: the Regional

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* Thus capital expenditures for new construction in the Norfolk division averaged $365,000 a year in 1936-37, but the program for 1938 was less than $75,000 (R. 364-365; and see R. 572-573).

** As shown above, there is no claim that the discharge of Staunton had any connection with union activities by him.

*** Morris was the only one of these three officers who took the stand. He testified that he was never discriminated against because of his membership (R. 700). Harrell's claim that May spoke to him disparagingly of unions (Decision, R. 973) was denied by May (R. 518).

Director of the Board had just two weeks earlier resumed active investigation of the company in regard to the three charges in this proceeding;* had there been any such disposition on the part of the company that was hardly an opportune time for its display.

But in fact the record is quite clear that the selection of the men to be laid off was governed by the customary standards of ability or value (including ability to get along with other men), seniority and dependents, of which the first was deemed the most important.** The officers selecting the men to be laid off testified without reservation that union activities or affiliations of the employees were not taken into consideration in any way.*** The reason for the selection of Harrell was his continuous embroilment in altercations with his employees and supervisors. He had been resentful and impertinent to his foremen, calling one or more of them a liar, and had provoked continual dissatisfaction among his associates; he was generally known to be surly and ill-tempered and difficult to get along with. Repeated complaints about his conduct had been received and he had already been warned. In addition he was not improving in his work and a number of the junior men were further advanced. He was, therefore, an obvious choice for the lay-off.****

The grievance committee of the Independent later investigated the selections of all the 13 men in Norfolk and came to the conclusion that they were entirely fair and nondis-

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* R. 712-713.

** R. 307-309, 364-366, 368, 382-383, 520-523, 526-527, 538-539, 542-549, 557-561, 567-568. These references include the testimony of May, Crafton and Holik, being all of the group of Norfolk supervisors who made the selection.

*** R. 366, 367, 517-519, 532, 548-549, 551-553, 556, 557.

**** R. 209-211, 219-223, 473, 478-480, 482-484, 485-489, 489-492, 519-520, 523-524, 526-529, 530-534, 557-561, 567.

criminatory, indeed that it would have been discriminatory to lay off any one else in their stead (R. 206-208, 667-668). No one has since been employed to take the place of any of the 13 men discharged (R. 268).

The record does not indicate that Harrell's continual difficulties with his associates were due principally to his strong preference for the IBEW as the Board asserts (Decision, R. 974; Brief p. 57); on the contrary the record overwhelmingly shows that Harrell's difficulties and unpopularity were due to his inordinate opposition to everything relating to his daily task. Flagrant discord of this sort must be ended regardless of the reasons for Harrell's feeling, nor could the operating staff sit in formal session to investigate all circumstances of every complaint made to them by their subordinate officers, as the Board seems to wish (Brief p. 57); no business could proceed on such a basis. Moreover, it is quite misleading for the Board to say that Harrell had "more seniority than five of the eight third class linemen whom the Respondent kept" (Decision, R. 974; Brief p. 54). There was no seniority among those men, for they were all made third class linemen on the same day (R. 365-366). As for initial employment, Harrell was employed less than 5 months before the youngest third class lineman and there were special reasons of experience, service, competence and promise for preferring each of those five men, which were plainly put in evidence without any effort at contradiction (R. 542-549). All these facts the Board ignores without reference.

Harrell's bearing is very well illustrated by the history of foreman Tomlinson, who is quoted by the Board (Brief, note 41, p. 54) as asking to have Harrell in his gang "because he was a good worker" whom he "would like to have as a regular man in his gang" (R. 478). Tomlinson did say that, after having Harrell in his gang "for one week" (R.

478). Harrell, being (contrary to the claim in the Board's Brief, p. 57) transferred frequently from gang to gang (R. 519), was latter returned to Tomlinson. Soon, however, he negligently left some tools in the way of a truck; when reprimanded by Tomlinson for causing the loss of the tools, Harrell "jumped on the truck driver and started cussing him out" and Tomlinson had to intervene to prevent a fight (R. 478-9). After this Harrell left the gang but was sent back in the following month. On this visit Tomlinson had at least three difficulties with Harrell: first he had to reprimand Harrell for "loud cussing going down Church Street" (R. 479). Next, he had to admonish Harrell about his disposition:

> "I told him, 'I know you are hot-headed and Mr. May knows you are hot-headed and everybody else at the plant knows that you are hot-headed.' I said, 'If you try to get out of this habit you can get along fine in this gang'." (R. 479)

Finally Tomlinson had to tell Harrell four times to push up a pole; thereupon Harrell threatened to fight him. In the course of the ensuing interview Harrell referred to the very statement of Tomlinson quoted in the Board's brief, namely, that Harrell "was a good worker"; when Tomlinson admitted that he had said that, Harrell replied "You told a damned lie" (R. 380).

So the foreman quoted by the Board as an authority for Harrell's qualifications had progressively more and more difficulty with him until at last that foreman was threatened with a fight for ordinary orders in the course of duty and called a liar for complimenting him. This is not a basis on which business can proceed. Similar instances could be added: foreman Fowler, also cited as an authority in the Board's brief (p. 57), disclosed a report that Harrell's accident was due to "damned carelessness" on his part (R. 473):

foreman Tweedy, the only other authority cited by the Board (Brief, p. 57) had a "run-in" with Harrell because of his refusal to work (R. 210-11 and 482-484).

There is no reasonable basis for any assertion (Board's Brief, p. 56) that the testimony in regard to Harrell is "rather general." On the contrary each of the three supervisors who participated in selecting the men to be laid off testified in detail as to the reasons for selection of each of the 13 men laid off and the reasons for not selecting other men who had approximately similar seniority or positions. As to Harrell, the conclusions of these supervisory officials were reinforced by a large body of specific histories of individual altercations (see footnote p. 84 above). It is not admissible to say (Board's Brief, p. 58) that one of these supervisors, Crafton, admitted that Harrell's attitude did not have "anything to do" with his layoff; the meaning of the witness was clear that Harrell would not have been discharged for his unruliness if a reduction in force had not been necessary (R. 551), but when reduction became necessary, Harrell was selected because "he had had frequent run-ins with his foreman and fellow employees" and was not as far advanced in the line work as others (R. 453).

So the court below was clearly right in holding that:

> ". . . any conclusion that the union affiliation of [Harrell] had any connection with his discharge is purely speculation, unsupported by anything in the evidence . . . Harrell was shown to be a hot-headed quarrelsome man who had given considerable trouble . . . We can find no evidence that his union affiliation or activities had anything to do with the matter. He was not prominent in the union and there was no reason for the company to desire to be rid of him because of his union affiliation. It continued to employ other union men high in the councils of the union, and the idea that he was discharged because of union affiliation is nothing more than suspicion" (R. 1017).

3. Conclusion

There is no need to cite authority for the settled rule that a reinstatement order to be valid must be supported by substantial evidence and not merely by suspicion. The following recent statement by the Circuit Court of Appeals for the Fifth Circuit is, however, so apt an epitome of that rule as applied to the specific point discussed in this section that quotation may be appropriate:

> "The evidence to justify them [reinstatement orders] ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough. The duty to weigh and test the evidence is of course on the Board. This court may not overrule a fact conclusion supported by substantial evidence, even though we deem it incorrect under all the evidence. Only when the evidence is such that in a jury trial it would be insufficient to support a like verdict may the judges interfere. *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660; *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 4 Cir., 93 F. 2d 985. So far as the National Labor Relations Act, 29 U. S. C. A. §151 et seq., goes, the employer may discharge, or refuse to reemploy for any reason, just or unjust, except discrimination because of union activities and relationships. In the matters now concerning us, the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to reemploy in each instance. There is no doubt that each employee here making complaint was discharged, or if laid off was not reemployed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath,

> if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. *If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath can not be disregarded because of suspicion that he may be lying.* There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. This was squarely ruled as to a jury in *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, and the ruling is applicable to the Board as fact-finder. That the witness was or is an employee of the party in whose behalf he testifies, is not in itself a reason to discard his oath, appears from the cited case, and was extensively demonstrated in *Chesapeake & Ohio R. Co.* v. *Martin,* 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983" (*N. L. R. B.* v. *Tex-O-Kan F. Mills Co.,* 1941, CCA 5, 122 F. (2d) 433, 438). (Italics added)

The Board's order as to Mann and Harrell plainly rests on no more than mere suspicion and should therefore be set aside under the above rule. The reinstatement order as to Elliott and Staunton is invalid if the Independent agreement was lawful, and in any case such order is barred as to Elliott by his unlawful conduct and as to Staunton by the voluntary nature of his choice to leave Norfolk. The reinstatement order should therefore be set aside in its entirety.

C.
THE FORM OF THE ORDER

If the Court should believe that any part of the Board's order was permissible, then in any case certain modifications of the order should be required on the ground that the unmodified form exceeds the power of the Board. The

first of such modifications is called for only if the Court should conclude that the finding of interference in violation of Section 8 (1) was permissible but not the finding of domination under Section 8 (2); the other modifications seem requisite unconditionally.

1. The Disestablishment Requirement

If the Court should conclude that the Board's finding of domination and interference with the organization of the Independent in violation of Section 8 (2) was not supported by evidence or justified by the statute, but that the Board's finding of anti-union expressions by Bishop and Edwards was permissible, these circumstances, it is respectfully submitted, will justify no more than a cease and desist order against future interference with rights under Section 7. Specifically, an order disestablishing the Independent would not be justified. This point was well expressed in *Humble Oil and Refining Co.* v. *N. L. R. B.*, 1940, CCA 5, 113 F. (2d) 85, 92:

> "It would be strange indeed if a labor organization, freely organized by a large majority of the employees, is to be destroyed whenever some well-wishing supervisor, contrary to his own duty and orders, says something in its favor. As we see it, the employees who freely formed these organizations have the right under the law to have them function. If the employer trespasses through his representatives, he and they ought to be stopped, but a more serious and demoralizing trespass than here appears is necessary to show such domination or interference or support as will justify annihilation of such organizations."

Consistently with that ruling a cease and desist orde. or a reinstatement order was sustained, but a disestablishment order set aside, in *N. L. R. B.* v. *A. S. Abell Co.*, 1938,

CCA 4, 97 F. (2d) 951, and *N. L. R. B.* v. *Arma Corporation,* 1941, CCA 2, 122 F. (2d) 153, 157.

2. Reimbursement of Checked-Off Dues

Paragraph 2 (e) of the Board's order requires the company to reimburse all members of the Independent for all dues deducted by the company and paid over by it to the Independent (R. 990). It is submitted that this provision of the order is beyond the power of the Board in the circumstances here presented. The five Circuit Courts of Appeals that have passed upon such a question have unanimously refused to enforce such a requirement.*

It is settled that the Board's power to require "such affirmative action . . . as will effectuate the policies of this Act" (Section 10 (c)) "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." (*Consolidated Edison Co.* v. *N. L. R. B.,* 1938, 305 U. S. 197, 235-6). The grant of power is not "to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act" but only "to achieve the remedial objectives which the Act sets forth" (*Republic Steel Corporation* v. *N. L. R. B.,* 1940, 311 U. S. 7, 11-12). These "remedial objectives," so far as back pay is concerned, are at most "to make the employees whole" (id., 311 U. S. at 12).

Looking then to the remedial end of making employees whole for losses sustained, it by no means follows, as Judge

* To the cases collected in the Board's brief, note 32, page 43, should be added *Corning Glass Works* v. *N. L. R. B.,* 1941, CCA 2, 118 F. (2d) 625.

Learned Hand pointed out for the Circuit Court of Appeals for the Second Circuit,* that mere conduct by an employer disqualifying a union as a collective bargaining agent inflicts "pecuniary damage upon each member of that union." On the contrary, all payments in question were fixed by the Independent and paid directly to it and used solely by it and, in Judge Hand's words, "it was by no means valueless to them." Indeed evidence here makes it plain that the Independent has been of important and conspicuous value to its members continuously since its organization. Where a union has been of value to its members, restoration of all dues necessarily goes further than making them whole and thus becomes punitive in nature.

If there be cases in which the record leaves it reasonably disputable whether the conduct and management of a union has been such as to confer value on its members, a question which in such circumstances might call for the administrative judgment of the Board, certainly that is not the situation here.

Throughout the whole proceeding there has been no finding by the Board nor any claim by the Board or its counsel** that the company since the organization of the Independent has in any way, directly or indirectly, given any aid or sup-

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* *Western Union Telegraph Co.* v. *N. L. R. B.*, 1940, 113 F. (2) 992, 997. The court further said "the act did not create a mass tort by which . . . the Board . . . could dispense with proof that the 'unfair labor practice' actually impinged upon the putative victims and caused them pecuniary damage." Both arguments were followed by Judge Allen for a majority of the Circuit Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *West Kentucky Coal Co.*, 1940, 116 F. (2) 816, 822-823.

** Except the isolated claim of the Board, irrelevant for this immediate question, that the first payment to the Independent was premature (*i.e.*, before its full amount had been actually deducted from wages) and thus an aid by the company (R. 967) and the claim of Board counsel, not made by the Board and irrelevant for this immediate question, that the closed shop and check-off clauses were an aid by the company (Brief, pp. 26, 38-39).

port to the Independent or dominated, interfered with, or influenced it in any way. The maximum assertion, whether by finding or in argument, has been that indications of employer preference influenced employee choice in favor of the Independent in the period immediately preceding its organization. By tacit admission therefore the Independent, since the time of its organization, has continuously acted with a single eye to the interests of the men. In such a situation the union has not been a mask through which the employer has perpetrated its own designs and used the employees' money for his own ends, nor is there any such possibility in the case at bar. As a matter of law therefore a reimbursement order is not remedial but punitive and thus beyond the Board's power.

The Board has receded from its initial view that a reimbursement provision is mechanically called for in each case (Board's Brief, Note 36, page 47), and the requirement is now sought to be justified only in particular circumstances (Board's Brief, page 44), chiefly where a closed shop clause exists (Board's Brief, pages 44 and 47). But the closed shop clause here was not an invention of the company foisted upon receptive agents to close the net around them; the uncontradicted evidence shows that it was a proposal of the Independent, vigorously resisted by the company, granted only as an extreme concession and still opposed by the company executives*. Clearly, therefore, in this case the employees have imposed that requirement upon the company, rather than the company's imposing it upon the men. The company should not be penalized because it negotiated in a spirit of fair concession rather than intransigence (*Kansas City Power & Light Co.* v. *N. L. R. B.*, 1940, CCA 8, 111 F. (2d) 340, 348). The company is no more at fault under the Act than if the employees had paid their

* R. 264-265, 299-300, 324-325, 358-359, 460-461.

dues directly to the Independent (*N. L. R. B.* v. *J. Greenebaum Tanning Co.*, 1940, CCA 7, 110 F. (2d) 984, 988, cert. den. 1940, 311 U. S. 662).

It is not true, as the Board argues (Brief, page 48), that the closed shop clause and the check-off clause removed "the only means remaining to employees who wished to resist the Company's illegal practices, namely, a refusal to pay dues". The agreement with the Independent specifically reserved full privilege on the part of each employee "to join or remain a member of any other labor organization."* An election or certification of bargaining representatives could have been requested at any time.

Should the Court conclude that the Board's finding of domination was permissible, then an order of disestablishment will fully achieve all purposes of the Act and wholly sweep away the Independent, its organization and its agreement. If any remedy is justified, which the company respectfully submits there is not, then this remedy fulfills all remedial purposes of the Act. A further requirement for dues reimbursement does not effectuate the remedial purposes of the Act, but penalizes the company for yielding to the insistence of its employees.

The dues reimbursement provision is, therefore, beyond the power of the Board in the circumstances here presented.

3. Notice of Privilege to Organize or Join a New Unaffiliated Union

Paragraph 2 (f) of the Board's order requires the posting of notices to the effect that employees are free to become or remain members of any one of the three labor organizations upon whose complaint this proceeding was instituted and that the company will not discriminate be-

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* Board's Exhibit 9, R. 826 [introduced at R. 48, 53]; and see R. 176-177.

cause of such membership (R. 990). The company submits that there should be included in this paragraph a provision that the employees are free to organize or join a new independent union.

The notice required by the Board's present order might well be interpreted by the employees as meaning that the formation of an independent union is outlawed, or at least is a foolhardy undertaking. This surely is not the purpose of the Act. The Act requires that the employee's choice be completely free, but it does not require a nationally affiliated labor organization, (Sections 1 and 2 (5)). It does not look with disfavor on independent unions which are truly independent. Unless the order corrects the impression it gives the employee that he can not join a new independent, his choice can not be termed completely free.*

The contention of the company here has the support of the Circuit Courts of Appeals for the Second,** Third,*** and Eighth**** Circuits. The basis for these decisions is admirably stated in *Westinghouse Electric & Mfg. Co.* v. *N. L. R. B.*, 1940, CCA 2, 112 F. (2d) 657, 661 (aff. *per curiam*, 1941, 312 U. S. 660):

"To post notices that the 'Independent' has been 'dis-

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* See *Cudahy Packing Co.* v. *N. L. R. B.*, 1939, CCA 8, 102 F. (2d) 745, 753 cert. den. 1939, 308 U. S. 565.

** *Westinghouse Electric & Mfg. Co.* v. *N. L. R. B.*, 1940, 112 F. (2d) 657, *affirmed per cur.*, 1941, 312 U. S. 660.

*** *N. L. R. B.* v. *Blossom Products Corp.*, 1941, 121 F. (2d) 260; *Roebling Employees Ass'n, Inc.* v. *N. L. R. B.*, 1941, 120 F. (2d) 289.

**** *Hamilton Brown Shoe Co.* v. *N. L. R. B.*, 1939, 104 F. (2d) 49; *Cudahy Packing Co.* v. *N. L. R. B.*, 1939, 102 F. (2d) 745, cert. den., 1939, 308 U. S. 565. The only recent case in which the request for such a modification seems to have been denied is *N. L. R. B.* v. *Moore-Lowry Flour Mills Co.*, 1941, CCA 10, 122 F. (2d) 419, 429, but the request seems to have been made only on application to modify a decree already ordered enforced and the scope of the request is far from clear.

established,' and to say nothing more, may well lead the employees to conclude that any unaffiliated union will fall under the same ban. The same reason which demands its 'disestablishment'—rigid impartiality between all kinds of organizations—demands public declaration that after it has been 'disestablished,' the field will be open for the employees' choice of any form they prefer. For this reason Article II(a) of the order will be modified by adding the following suffix: 'but the employees are free to organize any union they choose, whether or not it is affiliated with a national union'."

In the interests of fairness and clarity, the order of the Board should be amended here in a like manner.

4. Modifications Accepted by the Board

The Board in the court below requested that paragraph 2 (f) of the order be modified so as to require, instead of notices stating that the company "will cease and desist," notices stating that the company "will not engage in conduct from which it is ordered to cease and desist in paragraph (1)." The company now requests that this modification be made, if the order be enforced, since the latter wording is now the present practice of the Board, and the former is open to the objection that it requires the company to confess violation of the Act. See *N. L. R. B.* v. *Express Publishing Co.*, 1941, 312 U. S. 426, 438-439.

Moreover, as requested by the Board (Brief, Note 5, p. 7), the work relief provisions should be stricken out. *Republic Steel Corp.* v. *N. L. R. B.*, 1940, 311 U. S. 7.

CONCLUSION

It is respectfully submitted that the decree of the court below should be affirmed and that if any part of the decree be reversed in order to require enforcement of any part of the

Board's order, that order should at least be first modified in the manner hereinabove suggested.

Respectfully submitted,

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Of Counsel

Dated November 3, 1941.

APPENDIX

Opinion of Industrial Commission of Virginia

ROBERT E. ELLIOTT, CLAIMANT

v.

VIRGINIA ELECTRIC & POWER CO.,
EMPLOYER
self-insured.

CLAIM NO. 427557

December 22, 1938.

Claimant appeared in person.

MESSRS. ROMAN E. MILLER *and* W. E. KYLE, *Attorneys-at-Law*, Norfolk, Virginia, *for the Defendants.*

Hearing before Commissioner DEANS at Norfolk, Virginia, on December 15th, 1938.

DEANS, Commissioner, rendered the opinion.

Robert E. Elliott, Jr. filed an application with the Industrial Commission on October 19th, 1938, requesting a hearing alleging that he met with an accident on November 1st, 1937.

It is admitted that the claimant's average weekly wage would entitle him to the maximum weekly compensation should it be found to be compensable.

The claimant recites the fact that he had an accident but further did not produce any witnesses to same. The defendant showed by preponderance of evidence that the accident did not occur. The burden of proof is upon the

claimant to make his claim and as he has failed to do so, this claim is dismissed.

I, W. F. Bursey, Secretary, Industrial Commission of Virginia, hereby certify that the foregoing, according to the records of this office, is a true and correct copy of Opinion and Award in Claim, No. 427-557, *Robert R. Elliott, Jr., Claimant*, vs. *Virginia Electric and Power Co.*, self-insured.

I further certify that a Review as provided for in Section 60 of the Virginia Workmen's Compensation Act, was not requested.

Given under my hand and the seal of the Industrial Commission of Virginia, this the 15th day of May, 1939.

W. F. Bursey,
Secretary.

[Listed among claims denied at 20 Va. Indust. Com. 513.]